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83-1123
No.

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1983

CHRISTINE VAN WEY, - - - - - Petitioner

versus

RAYMOND F. O'NEAL,
DONNA O'NEAL and
BABY BOY VAN WEY, - - - - - Respondents

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF KENTUCKY

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January 6, 1984

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QUESTIONS PRESENTED

I. Where a parent first files but then revokes a voluntary petition to terminate her parental rights, does the Fourteenth Amendment Due Process Clause permit the State to terminate those rights without complying with the statutory procedures for involuntary termination?

II. Does the federal constitutional right to family privacy and integrity preclude the termination of parental rights based upon the best interests of the child without a showing of parental unfitness?

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IN THE

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No.

CHRISTINE VAN WEY - - - - - *Petitioner*

v.

RAYMOND F. O'NEAL
DONNA O'NEAL
BABY BOY VAN WEY - - - - - *Respondents*

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF KENTUCKY

The Petitioner, Christine Van Wey, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the Supreme Court of Kentucky entered in this proceeding on July 6, 1983.

OPINION BELOW

The opinion of the Supreme Court of Kentucky, entered July 6, 1983 and reported at 656 S. W. 2d 731 (1983), appears in Appendix A.

JURISDICTION

The judgment of the Court of Appeals of Kentucky was entered, as modified, on August 13, 1982. The Court of Appeals also denied a timely petition for rehearing on August 13, 1982. The Supreme Court of Kentucky granted Discretionary Review on October 28,

1982 and entered judgment on July 6, 1983. A timely petition for rehearing was denied on October 12, 1983, and this petition for certiorari was filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. §1257(3).

CONSTITUTIONAL PROVISIONS INVOLVED

Constitution of the United States, Amendment XIV, Section 1:

> All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any laws which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATUTORY PROVISIONS INVOLVED

Kentucky Revised Statutes 199.601 (App. T)
Kentucky Revised Statutes 199.603 (App. T)

STATEMENT OF THE CASE

A. Material Facts

Christine Van Wey (petitioner), a resident of Iowa, contacted Louisville attorney Katie Brophy to ask her assistance with the adoption of Ms. Van Wey's unborn child. Ms. Brophy contacted the O'Neals, who agreed to adopt the baby following his birth. Petitioner

traveled to Louisville, Kentucky, and she and her two children were placed in the home of Ms. Brophy's secretary for the two months prior to birth on January 22, 1981. While in the hospital Ms. Van Wey became very attached to her baby and from the moment the child was removed from the hospital has sought his return.

She contacted an attorney at the Legal Aid Society who in turn notified Ms. Brophy that petitioner no longer wished to have her parental rights terminated. There is a dispute as to what occurred next. Ms. Van Wey stated that Ms. Brophy pressured her to go to court the next morning by threatening the removal of Ms. Van Wey's two older children. Ms. Brophy testified that Ms. Van Wey changed her mind and requested that the termination proceed. In any event, Ms. Van Wey did sign a petition for the voluntary termination of her parental rights (App. D). She was questioned by the circuit court judge, but no order terminating her rights was entered.

Immediately upon her return to Iowa petitioner wrote a letter to the circuit court judge alleging that she had consented to the termination of her rights under duress and indicated her desire not to have her parental rights extinguished. Within three months Ms. Van Wey filed a Petition for Immediate Entitlement[1] seeking the return of her child. Still no order

[1]A Petition for Immediate Entitlement is a derivative of the traditional writ of habeas corpus used in Kentucky where custody of children is involved. See *Galloway* v. *Pruitt*, Ky., 469 S. W. 2d 556 (1971).

of termination had been entered and her parental rights remained intact.

A hearing was held wherein Ms. Van Wey attempted to prove her legal right to her child. The court at the outset limited the trial to the issue of immediate entitlement only (App. U). At the conclusion of the hearing Ms. Van Wey's petition was denied (App. N). The O'Neals subsequently moved the trial court to sign an order "voluntarily" terminating Ms. Van Wey's parental rights, and without any further proceedings such an order was entered on July 8, 1981 and again on August 10, 1981 (App. O and App. P).

B. Federal Questions Raised Below

Petitioner first raised the procedural due process issue in the trial court in response to the O'Neals' motion to terminate her parental rights referred to above.

> If this court proceeds at all, it must treat the matter as an involuntary termination and provide Ms. Van Wey with all the rights and protections to which she is entitled by state and federal law. Specifically, KRS 199.603 requires pleading and proof by a preponderance[2] of evidence that abandonment or substantial or continuous or repeated neglect or abuse occurred. In addition there are numerous mitigating factors that the court must consider before reaching its decision. Due process mandates a full hearing on the merits before parental rights can be involuntarily terminated. (Record at 166-168)

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[2]*Santosky, infra,* raised the standard of proof to "clear and convincing." (Footnote added)

The trial court responded by terminating petitioner's parental rights on the basis of KRS 199.601, the voluntary termination statute (App. O and App. T). That court did not address itself to the issue of due process of law.

Petitioner appealed the decision of the trial court and in her brief as one ground for reversal argued that her Fourteenth Amendment rights had been violated.

> The right to family integrity, including the protection of the parent-child relationship, is a liberty interest protected by the Fourteenth Amendment. . . . The United States Supreme Court has "frequently emphasized the importance of the family. The rights to conceive and to raise one's children have been deemed 'essential' . . . 'basic civil rights of man,' . . . and '(r)ights far more precious . . . than property rights.' " *Stanley* v. *Illinois,* 405 U. S. 645 (1972).

(Brief for Appellant in the Kentucky Court of Appeals at 28)

The Court of Appeals of Kentucky reversed the lower court and held: "Even assuming the consent was voluntary and freely given at the time the petition was signed, it was properly withdrawn prior to any final action which would otherwise have terminated Ms. Van Wey's rights to her child. There is no basis, in fact or law, for an involuntary termination." (App. R) The Court of Appeals, while not specifically addressing the constitutional guarantees, did state that "so long as the parents are fit for the care, custody, and control of a child, their rights are not involuntarily

terminated simply because a child's economic, social or emotional environment can be improved by placing it in another home. Such considerations have never been approved as an adeqaute basis for the termination of parental rights, at least in this country." (App. R)

The Supreme Court of Kentucky granted Discretionary Review upon the motions of respondents herein. In her brief to that court, petitioner reiterated her constitutional claims. Citing *In Re J.P.*, 648 P. 2d 1364 (Utah 1982), petitioner argued, "In addition to offending the due process clause, . . . 'the right of a parent not to be deprived of parental rights without a showing of unfitness, abandonment, or substantial neglect is so fundamental to our society and so basic to our constitutional order . . . that it ranks among those rights referred to in . . . the Ninth Amendment.'" Petitioner further directed the court to *Santosky* v. *Kramer*, 455 U. S. 745, 102 S. Ct. 1388 (1982); *Meyer* v. *Nebraska*, 262 U. S. 390, 43 S. Ct. 625 (1923); *Skinner* v. *Oklahoma*, 316 U. S. 535, 62 S. Ct. 1110 (1942); *May* v. *Anderson*, 345 U. S. 528, 73 S. Ct. 840 (1953); *Stanley* v. *Illinois*, 405 U. S. 645, 92 S. Ct. 1208 (1972); and *Lassiter* v. *Department of Social Services of Durham, North Carolina*, 452 U. S. 18, 101 S. Ct. 2153 (1981). (Brief for Respondent, Christine Van Wey, in the Supreme Court of Kentucky at 36 and 38-39.)

The opinion of the Supreme Court of Kentucky, reversing the Court of Appeals and upholding the decision of the trial court, is devoid of any reference to the federal constitutional arguments raised by Ms. Van

Wey (App. A). Ms. Van Wey's petition for rehearing was subsequently denied and this petition for a writ of certiorari followed.

REASONS FOR GRANTING THE WRIT

I. The Kentucky Supreme Court Has Set a Dangerous Precedent by Publishing an Opinion Which Flagrantly Disregards Basic Procedural Due Process Guaranteed by the U. S. Constitution.

It is now axiomatic that the interest of natural parents in the care and custody of their children is a liberty interest protected by the Due Process Clause of the Fourteenth Amendment. *Santosky* v. *Kramer,* 455 U. S. 745, 102 S. Ct. 1388 (1982), *Stanley* v. *Illinois,* 405 U. S. 645, 92 S. Ct. 1208 (1972). Three factors are balanced to determine how much process is due: the private interests at stake, the government's interest, and the risk that the procedures used will lead to erroneous decisions. *Matthews* v. *Eldridge,* 424 U. S. 319, 336, 96 S. Ct. 893, 903 (1976).

In *Lassiter* v. *Department of Social Services of Durham, North Carolina,* 452 U. S. 18, 28, 101 S. Ct. 2153, 2160 (1981), this Court discussed the *Eldridge* test in the context of a termination case. Although an extra factor was involved in that case, the presumption against the right to appointed counsel, the other three factors alone balanced in favor of the parent. Although due process is a flexible concept, the importance of parental rights in relation to the relative de minimus interest of the state mandates a high degree of due process in cases involving the termination of parental rights. *Lassiter, supra,* and *Santosky, supra.*

In this case Mrs. Van Wey signed a petition to voluntarily terminate her rights pursuant to KRS 199.-601,[3] but withdrew her consent before her rights were terminated. The trial court indulged itself in the fiction that Ms. Van Wey acquiesced at the time her rights were terminated, but it was abundantly clear that she strenuously objected. To the extent that KRS 199.601 is applied to allow termination in the absence of *present* consent, it violates due process.

Once the illusion of voluntariness is dismissed, it is even clearer that petitioner's rights were violated. It is inconceivable that any interest of the state would suffice to completely deny petitioner the basic due process requirement of "the opportunity to be heard 'at a meaningful time and in a meaningful manner.' " (Citations omitted) *Eldridge, supra,* at 334.

The trial court expressly limited the scope of the hearing to the issue of immediate entitlement (App. U). The hearing was to determine neither permanent custody nor to terminate parental rights, yet, without any notice or further proceedings, permanent custody was awarded to the O'Neals and Ms. Van Wey's rights were summarily terminated.

The court made no attempt to follow the procedural requirements of the involuntary termination statute, KRS 199.603 (App. T). There was no proof of abandonment or substantial or continuous or repeated neglect or abuse. To the contrary, petitioner's evidence showed her to be a fit parent. (App. L and M) Significantly, there were never any findings that Ms. Van

[3] Petitioner has consistently claimed it was signed under duress.

Wey was an unfit mother. The court instead chose to close its eyes and ears to reality and "voluntarily" terminate the parental rights of a woman obviously objecting.

The Kentucky Supreme Court never addressed the due process issue. This casual yet complete severing of all family ties is totally repugnant to the concept of fundamental fairness embodied in the Due Process Clause. This flagrant disrespect for the federal constitution diminishes the rights of all.

II. The Use of a "Best Interests" Standard to Terminate Parental Rights Without Any Finding of Parental Unfitness Seriously Erodes the Fundamental Liberty Interest in Family Integrity Historically Recognized by This Court.

In deciding whether or not petitioner's parental rights should be terminated, the Supreme Court of Kentucky not only denied her prior notice and an opportunity to be heard, but it erroneously based its decision upon its determination of the best interests of the child. There was no credible proof, and certainly never any judicial finding, that Ms. Van Wey was unfit as a parent. In fact, the report from the Department of Social Services states: "She certainly appears to be settled and able to provide for her baby at this time." (App. L)

In support of the best interest standard, the Kentucky Supreme Court relies primarily upon child custody cases. "The legal principle involved does not turn on whether the issue is adoption or custody." (App. A) That Court's interpretation is in direct

conflict with the balancing test consistently applied by this Court to resolve Due Process questions. *Eldridge, supra* and *Santosky, supra,* at 1394. "If anything, persons faced with forced dissolution of their parental rights have a more critical need for procedural protections than do those resisting state intervention into ongoing family affairs." *Id.*

The application of a best interest standard to the termination of parental rights also infringes upon the substantive constitutional right to family integrity. In *Quilloin* v. *Walcott,* 434 U. S. 246, 98 S. Ct. 549 (1978), this Court upheld a "best interests of the child" test, but only under the specific circumstances of that case. In that case, the natural mother's husband was adopting her eleven year old child, and the three of them had shared a home for some eight years. The natural father had never petitioned for legitimation nor provided regular support. This Court, however, added that:

> (W)e have little doubt that the Due Process Clause would be offended "(i)f a State were to attempt to force the breakup of a natural family, over the objections of the parents and their children, without some showing of unfitness and for the sole reason that to do so was thought to be in the children's best interest." *Smith* v. *Organization of Foster Families,* 431 U. S. 816, 862-863, 97 S. Ct. 2094, 2119, 53 L. Ed. 2d 14 (1977) (Stewart, J., concurring in judgment). *Quilloin, supra,* at 255.

Obviously, this Court understands the frightening implications of routinely applying a best interest test

without regard to parental fitness. There will always be a "better" home available, but the Constitution precludes the shuffling of children based upon that factor alone. Applying the same best interest standard to custody and termination cases alike seriously erodes substantive due process with potentially dangerous consequences to family life.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the Supreme Court of Kentucky.

Respectfully submitted,

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APPENDIX

APPENDIX A

RENDITION DATE: JULY 6, 1983
TO BE PUBLISHED

SUPREME COURT OF KENTUCKY

82-SC-706-DG
82-SC-707-DG

BABY BOY VAN WEY - - - - - - - *Movant*

v.

CHRISTINE VAN WEY,
RAYMOND F. O'NEAL and
DONNA O'NEAL - - - - - - - *Respondents*

AND

RAYMOND F. O'NEAL and DONNA O'NEAL,
His Wife - - - - - - - - - *Movants*

v.

CHRISTINE VAN WEY - - - - - - *Respondent*

On Review From Court of Appeals
No. 81-CA-2181-MR
Jefferson Circuit Court—No. 81-AD-0037-T

OPINION OF THE COURT BY JUSTICE LEIBSON REVERSING

In November 1980, Christine Van Wey, a resident of Muscatine, Iowa, contacted attorney Katie Brophy of Louisville, Kentucky and solicited her aid in arranging for the birth and placement for adoption of her unborn child. Ms. Van Wey, the mother of two daughters, ages 5 and 7,

was separated from her husband, deserted by the man she was living with, and apparently destitute.

Ms. Brophy arranged for Ms. Van Wey to come to Louisville to deliver the unborn child. She also arranged for a prospective adoptive couple, Raymond F. and Donna O'Neal. The O'Neals assumed financial responsibility for all fees and expenses attendant to birth and adoption of the child by the O'Neals.

Ms. Van Wey came to Louisville with her two daughters, lived in the home of Ms. Brophy's secretary for approximately two months preceding the birth of the child, and with the assistance and direction of Ms. Brophy went through all the medical and legal steps preparatory for the birth and adoption of the child. This included a trip to the Kentucky Department of Human Resources where she met with an adoption worker and reviewed her application to place the unborn child for adoption. The worker subsequently approved that application. The O'Neals were approved for placement of the child in their home. Immediately before the child's birth, Ms. Van Wey signed a consent form permitting Ms. Brophy to obtain immediate possession of the newborn child to deliver to the O'Neals.

Baby Boy Van Wey was born January 22, 1981, at the Norton-Children's Hospital, Louisville, Kentucky. On January 25, 1981, Ms. Brophy picked up the infant at the hospital and delivered him to the O'Neals. But by now Ms. Van Wey had formed an emotional attachment for the child. She told hospital personnel that she had changed her mind about her plans to place the child for adoption and she contacted a social worker for assistance. She later testified to a heated telephone conversation with Ms. Brophy and Ms. Brophy's secretary and to threats and attempts at intimidation, which are denied. Through the social worker she contacted an attorney with the Legal Aid Society in Louisville, who offered assistance and attempted to allay

her fears. The Legal Aid Society attorney then notified Ms. Brophy that Ms. Van Wey intended to seek return of the infant. But instead of doing so, later that evening she contacted Ms. Brophy and indicated to her that she had again changed her mind, that she wanted to appear the following day in court for the purpose of terminating her parental rights, and then take her other two children and go home to Iowa. The O'Neals were so notified.

The following morning, January 27, 1981, Ms. Van Wey went to Ms. Brophy's office, and then, with her to the courthouse. She executed a "Petition for Voluntary Termination of (her) Parental Rights," under oath before the Deputy Clerk. She went with Ms. Brophy to the chambers of the Honorable Jack E. Mudd, Jefferson Circuit Court, to whom the case was allotted. Judge Mudd conducted a hearing during which he explained to her the legal consequences of her actions and satisfied himself as to the voluntary and informed nature of her acts. At that point, Ms. Van Wey had taken all steps that would be necessary on her part in order for a judgment terminating her parental rights to be entered. However, there were other steps involved that would not involve Ms. Van Wey. Those were appointment of a Guardian Ad Litem to accept service for the child and represent the infant if necessary and a Warning Order procedure against Ms. Van Wey's estranged husband who was named in the petition so that his parental rights could also be terminated. A copy of the letter to the O'Neals from the Department for Human Resources approving them for home placement of the child and subsequent independent adoption procedures was filed with the petition.

Ms. Van Wey took money from Ms. Brophy for her expenses and returned to Iowa with her two children. But she did not forget about her newborn baby. Two weeks later she wrote to Judge Mudd, stating that she had gone

through with the hearing because she was threatened and intimidated by Ms. Brophy, that she did not want her parental rights terminated and that she wanted "to have my parental rights reinstated."

The father of the child was represented as "unknown" when the petition was sworn to before a Deputy Clerk and at the time of the hearing before Judge Mudd. But Ms. Van Wey had now reestablished her former living arrangements with another man, and he filed an affidavit that he was the father of the child and stated "I do not want to give up my parental rights."

Ms. Van Wey then recontacted the Legal Aid Society attorney. On April 30, 1981, through this new attorney, Ms. Van Wey filed a "Petition for Immediate Entitlement, Possession and Custody," stating that the Petition for Voluntary Termination was signed under "duress," that she "revokes" her consent to the termination of her parental rights, and seeks possession and custody of Baby Boy Van Wey.

Thus, the issue is joined. On the one hand, the O'Neals ask the court for a judgment terminating Ms. Van Wey's parental rights, so they can proceed with the adoption. On the other hand, Ms. Van Wey seeks to revoke her consent to termination of her parental rights and regain possession and custody of her child. But this is not just a two-sided law suit. The third party, with an interest in the outcome at least as great as the first two, is Baby Boy Van Wey. He is represented in this litigation by a Guardian Ad Litem, appointed by the court to protect his interests and his interests alone. The report of the Guardian Ad Litem was "that the welfare and best interests of the child will continue to be protected in the home of the prospective adoptive parents."

Judge Mudd conducted a full-scale hearing on June 17, 1981. The issues at that hearing included:

1) Was Ms. Van Wey's consent obtained in the first instance by duress or coercion?

2) Did Ms. Van Wey have a right to revoke her consent or withdraw her petition at any time before judgment regardless of whether or not her acts were initially voluntary?

3) Should the question of termination be decided on the basis of the law that relates to voluntary termination, KRS 199.601, or the law that relates to involuntary termination, KRS 199.603?

The voluntary termination statute provides that "the best interest of the child shall be considered paramount." The involuntary termination statute also provides for termination "in the best interest of the child," but decides the question on the narrow grounds of parental "abandonment, neglect or abuse." In other words the parent must be found unfit before involuntary termination takes place.

The trial court made extensive Findings of Fact and Conclusions of Law in an order dated June 22, 1981 and supplemented July 8, 1981. It concluded that whatever the evidence as to Ms. Van Wey's emotional distress and her fears before the time of the hearing in the court's presence on January 27, 1981, the "legal steps to complete the voluntary termination of her parental rights . . . taken by her before this court (on that date) were not the result of threats or duress at that time." There was ample evidence to support the conclusion of the court that Ms. Van Wey, who had first wanted the placement and adoption and then changed her mind, had again changed her mind at the time she was in court January 27, 1981.

Having found that the consent should not be set aside for duress, the court then concluded:

> "The final and most important factor in reaching a decision in this case is the best interest of the baby

himself. This should be of paramount concern and no decision can be or should be made in conflict with this best interest."

Using the "best interest of the child" standard, the court recited several significant findings as to why the child's best interest would be served by remaining with the O'Neals. Ms. Van Wey's Petition for Immediate Possession and Entitlement to Custody, which included her effort to revoke her consent, was denied and her parental rights were terminated. The court also terminated the parental rights of her husband, who denied being the child's father and made no defense. The person now represented as the child's father did not intervene and was not a party to the litigation.[1] Neither the husband nor the putative father is a party to this appeal.

On appeal to the Court of Appeals the judgment was reversed and remanded. The opinion of the Court of Appeals is somewhat contradictory. First, in dealing with the finding of the trial court that Ms. Van Wey was not acting from undue influence or duress at the time of the voluntary termination proceedings on January 27, 1981, the court stated "we need not, and therefore do not, specifically determine that the trial judge's finding is clearly erroneous." On the other hand, the Court held that "the consent in this case cannot be considered to be voluntary." If the Court of Appeals means that the consent given at the time of the hearing before Judge Mudd cannot be considered to be voluntary, there is ample evidence in the record to support Judge Mudd's conclusion to the contrary.

However, the key issue on this appeal stems from the decision by the Court of Appeals "that Ms. Van Wey made

[1]If and when the putative father undertakes legal steps, he will be faced with the United States Supreme Court decision in *Quilloin* v. *Walcott*, 434 U. S. 246, 98 S. Ct. 549, 54 L. Ed. 2d (1978), *reh. den.* 435 U. S. 918, 98 S. Ct. 1477, 55 L. Ed. 2d 511.

a timely revocation of any consent which she originally gave, even if such was voluntary." It is undisputed that Ms. Van Wey has notified the court that she revokes her consent. But the question is whether she has an absolute right to thus terminate the proceedings, so that thereafter she can only have her parental rights terminated on standards related to involuntary termination, "abandonment, neglect or abuse," or whether the court, having found that consent was voluntarily given, should now consider the best interest of the child in deciding whether to allow Ms. Van Wey to revoke her consent or withdraw her petition. The Court of Appeals concluded:

> "As a matter of law, sufficient reason was given to revoke the petition to terminate. In order to thereafter issue a judgment in opposition to the wishes and consent of the natural mother, the conditions required for the involuntary termination must be clearly proven. There was no finding that Ms. Van Wey was an unfit mother."

We disagree. We agree with the trial court that, having found that the petition was initially voluntary, when the mother later attempted to revoke her consent, the court had a responsibility to consider the overall welfare of the child in deciding whether or not to permit such revocation. "Sufficient reason" means more than emotional distress at the time the petition for voluntary termination is filed. In the cases cited denying adoption when a mother revokes consent for "sufficient cause," there were elements of coercion or deception or the mother was not legally able to give consent. *Skaggs* v. *Gannon*, 293 Ky. 795, 170 S. W. 2d 12 (1943); *Warner* v. *Ward*, Ky., 401 S. W. 2d 62 (1966). Mother love alone would be sufficient reason to seek to revoke one's consent if "sufficient reason" had no limitations.

But Ms. Van Wey embarked upon a course of conduct over a period of two months directed at giving up possession and custody of her child and placing the child in a proper home for adoption. She has now changed her mind at least once, and, according to the view of the trial judge who heard the evidence, twice more—once back to giving up the child and then back once more to keeping the child. Something has changed. This child has been placed in the O'Neal's home for care, custody and adoption. Ms. Van Wey bears at least a share of the responsibility for this action. Once these steps have been taken, the fact situation has changed. The steps taken have legal consequences. The legal situation has also changed. We have sympathy and concern for both Ms. Van Wey and the O'Neals. But the Solomon type decision which must now be made does not turn on the feelings or wishes of either. The child's legal situation has changed. The legal decision is now squarely where the trial court put it: "The best interest of the child shall be considered paramount."

The handwritten letter from Ms. Van Wey to Judge Mudd dated February 9, 1981 shows that the infant was delivered voluntarily to the O'Neals. Ms. Van Wey writes that *after* the infant was discharged to the care of Ms. Brophy and had left the hospital "I knew I wanted him with me." KRS 405.020 establishes the *initial* right of the parent to custody of her child, but not the continuing right once custody has been relinquished. A long line of Kentucky cases beginning with *Lee* v. *Thomas,* 297 Ky. 858, 181 S. W. 2d 457 (1944), where the mother signed her consent for adoption in the hospital and then attempted to revoke her consent and resist the adoption procedure, hold that the interest and welfare of the infant must then be considered. The right of the parent to reclaim the child is not extinguished, but the parent's superior statutory right to custody has been waived so that thereafter the court will look

primarly to the child's welfare in awarding custody. *Galilean Children's Home* v. *Ball,* 308 Ky. 319, 214 S. W. 2d 403 (1948); *Shaw* v. *Graham,* Ky., 310 S. W. 2d 522 (1958); *Higgason* v. *Henry,* Ky., 339 S. W. 2d 929 (1960).

The legal principle involved does not turn on whether the issue is adoption or custody. In *Rose* v. *Ledford,* 306 Ky. 662, 208 S. W. 2d 957 (1948), a father was seeking to regain custody from the child's maternal grandparent. The court held that "a parent may not take (children) away from those to whom he surrendered them without first showing that it would be for the best interest of the child to do so." There is no reason, legal or factual, to distinguish this case from its predecessors simply because in this case the mother seeks to withdraw her consent to the termination of her parental rights. The principal issue in the case, as shown by the fact that the mother asserts her rights through a petition for possession and entitlement to the child, is the same issue as in *Rose* v. *Ledford, Lee* v. *Thomas,* and *Shaw* v. *Graham, supra.* The fact that the mother had understandable "reasons" to give up her child and "cause" to wish to regain her child does not obviate the burden on her to show that to return custody to her would be for the child's best interest. The mother must bear this burden even in the absence of proof that she is unfit in the context of the standard established by the involuntary termination statute (abandonment, neglect or abuse).

The child's Guardian Ad Litem filed a report following the initial hearing summarizing the facts that showed why this child would be much better off with the O'Neals, as opposed to being returned to Ms. Van Wey. Significantly, the Guardian Ad Litem, representing Baby Boy Van Wey, has appealed the judgment of the Court of Appeals ordering that the child be returned to its natural mother. The record is replete with reasons why the child's welfare is

best served by remaining with the O'Neals. He has prospects there for a stable home environment, capable parenting, and economic and social advantages in sharp contrast to his prospects with Ms. Van Wey. We cannot overlook the fact that through no fault of anyone, neither the O'Neals nor Ms. Van Wey, the child is now two and a half years old and has been with the O'Neals since birth. The delay results from the time necessary to try a case of this complexity, prepare the record for appeal, and go through two appellate courts. The natural bonding that has taken place in six months between the child and the O'Neals and the child's home environment was a factor considered by the trial court when he decided the case. No doubt this bonding is much greater now, some two years later.

On the other hand, the strong ties of blood and the natural love of a mother were also factors for the court to consider. They were considered. But they are not the only considerations.

The trial court concluded with obvious regret that in "cases such as this, someone is always hurt," but "a decision must be made." That the decision made by the trial court is in the best interest of the child is amply supported by the evidence.

The situation seems to create a legal paradox because the judgment terminating the mother's parental rights is entered against her consent. But this conforms to the general rule in civil cases. A plaintiff's right to dismissal is no longer absolute once the issue has been joined. At that point:

> "The matter of dismissal lies within the judicial discretion of the court. The essential question is whether the dismissal would be prejudicial to the defendant." Clay, Ky. Prac., 3rd Ed., Civil Rule 41.01.

Baby Boy Van Wey is a named defendant in the termination petition. The O'Neals were "joined as party respondents in the above-styled case on motion of the petitioner, Ms. Van Wey, by order dated May 26, 1981." These defendants all had an interest in the litigation that barred Ms. Van Wey from the right to dismiss except after appropriate consideration of prejudice to their rights. Actually, Ms. Van Wey was in a dilemma of her own, in that she wished to revoke her consent, but wished to use the same action as a vehicle to pursue her claim to possession and entitlement of the child.

Perhaps recognizing that the baby has now adapted to a new environment and new relationships is a factor mitigating against her claim, Ms. Van Wey argues that to consider such a factor in this case is unreasonable because the O'Neals were told almost immediately after they received the baby that Ms. Van Wey had changed her mind. Unfortunately, they were also told later that same night that Ms. Van Wey had once more changed her mind and would go forward with the voluntary termination the next morning. It was three months later when Ms. Van Wey filed her petition for immediate entitlement that the O'Neals first learned that custody and adoption would be contested. We see nothing in the conduct of the O'Neals that makes it inequitable to consider the baby's new environment as a factor in the decision as to the best interest of the child. In any event, the determination of this question, or indeed of this case, does not turn on the equities between these two parties, but on the paramount interest of Baby Boy Van Wey, who is not estopped by the actions of either.

In a similar vein, the conduct or misconduct, as the case may be, of attorney Brophy is not a factor critical to the decision in this case. The trial court referred to Ms. Brophy's conduct as "one final blackmark in this case, which we cannot overlook." She continued to be attorney

of record for Ms. Van Wey after there was an obvious conflict with her client of which she had been notified by an attorney from the Legal Aid Society. She revealed none of this to the trial judge. It may be that present statutes permitting private placement and adoption should be given serious reconsideration by the legislature. The potential for postpartum conflict between the natural mother and the prospective adoptive parents who agree to pay the prospective mother's expenses, medical and legal, creates a situation too fraught with the possibility of abuse. The Court of Appeals' opinion strongly suggests an interest in inhibiting the private placement of children through a scheme of this nature by stating the converse of the proposition, that the court's decision is not intended to "inhibit the successful placement of children in adoptive homes . . . through a legitimate child-care agency or when the child is placed in a home subsequent to a final termination of parental rights." But the need for restrictions in private placement procedures addresses itself to the legislature. The trial court correctly looked past both the attorney's conflict of interest problems and the need for "a close look" at our adoption laws. The trial court pointed up the problem here where the law permits a nonresident, "who is in indigent circumstances and in a desperate state of need, to come to this state for the sole purpose of giving birth to a child to be adopted." The trial court correctly concluded, with obvious reluctance:

> "At present, our state laws tolerate it and our Department for Human Resources grants permission for the acceptance (placement) of such children for adoption."

The placement of the child followed the procedures specified by the legislature. The petition for voluntary termination of Ms. Van Wey's parental rights did likewise. We hold with the trial court that the initial voluntary consent

placed this case squarely in the category of cases holding that a parent who has transferred possession and custody of his or her child to another has surrendered the primary right of custody and thereafter the court shall determine custody on the basis of the best interest of the child. In the circumstances of this case the determination of custody and the termination of parental rights go hand in hand. They are joined together in the same legal problem and subject to the same resolution. Baby Boy Van Wey is not a piece of property. He is an important human being. When Ms. Van Wey filed her Petition for Voluntary Termination she invoked the jurisdiction of the Court of Justice to look out for the welfare of this human being.

The decision of the Court of Appeals is reversed. The final judgment of the trial court is affirmed.

Aker, Leibson, Stephenson, and Wintersheimer, J.J. concur. Vance, J., files a dissent in which Stephens, C.J. and Gant, J. join.

Attorneys for Movants:

IRENE P. LONG
Bedford, Kentucky 40006

STEPHEN P. SMITH, JR.
1526 Ky. Home Life Bldg.
Louisville, Kentucky 40202

Attorneys for Respondent:

ELLEN G. FRIEDMAN
ROBERT F. SMITH
Legal Aid Society, Inc.
425 W. Muhammad Ali Blvd.
Louisville, Kentucky 40202

Guardian Ad Litem for Baby Boy Van Wey:

CHARLES W. DOBBINS, JR.
600 W. Main Street
Louisville, Kentucky 40202

APPENDIX B

SUPREME COURT OF KENTUCKY

82-SC-706-DG
82-SC-707-DG

BABY BOY VAN WEY - - - - - - - *Movant*

v.

CHRISTINE VAN WEY,
RAYMOND F. O'NEAL and
DONNA O'NEAL - - - - - - - *Respondents*

On Review from Court of Appeals
No. 81-CA-2181-MR
Jefferson Circuit Court—No. 81-AD-0037-T

AND

RAYMOND F. O'NEAL and DONNA O'NEAL,
His Wife - - - - - - - - *Movants*

v.

CHRISTINE VAN WEY - - - - - *Respondent*

On Review from Court of Appeals
No. 81-CA-2181-MR
Jefferson Circuit Court—No. 81-AD-0037-T

DISSENTING OPINION BY JUSTICE VANCE

This action commenced with the filing of a petition by a mother to terminate her parental rights to a child pursuant to K.R.S. 199.601. A short time after the filing of the petition for voluntary termination, the mother notified

the trial judge by letter that the petition was filed under duress and that she did not wish to voluntarily terminate her parental rights. Subsequently, an amendment was filed in which the mother sought to have the immediate possession of her child restored to her. It was originally contemplated that the child, when born, would be placed for adoption. Proceedings to terminate parental rights, proceedings for immediate possession of children, and proceedings for adoption are entirely separate proceedings; however, the majority opinion discusses the issues as if the same criteria for decision were interchangeably applicable to each of them.

Thus the issue of whether a parent can dismiss ar revoke a petition for voluntary termination of parental rights is decided here in the context of what the court considers to be the best interest of the child rather than the basis of whether the parent desires to voluntarily terminate parental rights.

I dissent from that portion of the opinion which approves termination of the mother's parental rights. There are two ways in which the parental rights of a parent to a child may be terminated. One is an involuntary termination, against the will of the parent, on the grounds of abandonment or continuous neglect and abuse. Such a petition may be instituted by the Cabinet for Human Resources, a licensed child caring agency, certain officers, or a parent. No such petition for involuntary termination of the parental rights of this Mother was ever filed.

The other method is voluntary termination whereby a parent files a petition in circuit court asking that the parent be permitted to voluntarily terminate parental rights and stating the reason therefor. A person cannot terminate his parental rights, even voluntarily, until a judicial hearing has established that such a voluntary ter-

mination would be in the best interest of the child and an order of termination has been entered.

The point is that such a termination is voluntary on the part of the parent. To say that a proceeding is voluntary and that the parent voluntarily relinquishes and terminates parental rights, when as here, the mother made it plain that she did not want to terminate her parental rights is contradictory on its face.

There was much testimony of threats and overreaching pressure brought to bear upon this mother which allegedly caused her to file the petition against her will. Regardless of whether the filing of the petition was voluntary or involuntary, any subsequent termination of her parental rights was not voluntary if she opposed it. A voluntary termination is one which the parent willingly pursues, is desirous of obtaining, and requests the court to approve.

The majority cites C.R. 41.01 to support a holding that the mother in this case could not as a matter of right revoke her petition to terminate her parental rights. C. R. 41.01 provides:

> Subject to the provisions of Rule 23.02, of Rule 66, and of any statute, an action, or any claim therein, may be dismissed by the plaintiff *without order of court,* by filing a notice of dismissal *at any time* before service by the adverse party of an answer or of a motion for summary judgment, whichever first occurs, ... (Emphasis mine.)

This rule permits an unrestricted right to dismiss an action or any claim therein at any time before service of an answer by the adverse party or a motion for summary judgment.

Even if the filing of a petition to terminate parental rights be considered to be an adversary proceeding — no answer had been filed by any party when the revocation

of the petition was attempted and no motion for summary judgment had been made. So it would seen that this mother had an absolute right to revoke, withdraw or dismiss her petition for voluntary termination of her parental rights. Having made it plain that she did not wish to proceed to voluntarily terminate her parental rights, it was error for the trial court to terminate those rights on the basis of the "so-called" voluntary petition.

Stephens, C. J., and Gant, J., join in this dissent.

APPENDIX C

SUPREME COURT OF KENTUCKY

82-SC-706-DG
82-SC-707-DG

BABY BOY VAN WEY - - - - - - - *Movant*

v.

CHRISTINE VAN WEY,
RAYMOND F. O'NEAL and
DONNA O'NEAL - - - - - - - *Respondents*

On Appeal from Jefferson Circuit Court
#81-AD-0037-T
Honorable Jack E. Mudd, Judge

AND

RAYMOND F. O'NEAL and DONNA O'NEAL,
His Wife - - - - - - - - - *Movants*

v.

CHRISTINE VAN WEY - - - - - *Respondent*

ORDER DENYING PETITION FOR REHEARING

Respondent Christine Van Wey's petition for rehearing is denied.

Stephens, C. J., and Aker, Gant, Leibson, Stephenson, and Winhersheimer, J.J., concur.

ENTERED October 12, 1983.

(s) Robert F. Stephens
Chief Justice

APPENDIX D

JEFFERSON CIRCUIT COURT

SIXTH DIVISION

No. 81-AD-0037-T

CHRISTINE VAN WEY - - - - - *Petitioner*

v.

STANLEY VAN WEY
WARNING ORDER AND MILITARY ATTORNEY
TO BE APPOINTED
BABY BOY VAN WEY, an infant under
14 years of age
GUARDIAN AD LITEM TO BE APPOINTED
(Serve: Guardian ad Litem) - - *Defendants*

PETITION FOR VOLUNTARY TERMINATION OF PARENTAL RIGHTS
PETITION FOR INVOLUNTARY TERMINATION OF PARENTAL RIGHTS
AND
AFFIDAVIT FOR APPOINTMENT OF WARNING ORDER AND MILITARY ATTORNEY

1. The Petitioner, CHRISTINE VAN WEY, states that she is the natural mother of a child, BABY BOY VAN WEY, born January 22, 1981.

2. The Petitioner, CHRISTINE VAN WEY, states that she is willing to relinquish all of her parental rights in and to the child, BABY BOY VAN WEY, to the couple approved by the Department for Human Resources.

3. The Petitioner, CHRISTINE VAN WEY, is authorized under KRS 199.601 to institute this action.

4. The Petitioner, CHRISTINE VAN WEY, states that the infant Defendant, BABY BOY VAN WEY, was born January 22, 1981, in Louisville, Jefferson County, Kentucky.

5. The Petitioner, CHRISTINE VAN WEY, states that she was married at the time of the birth of the infant Defendant to Stanley Van Wey. Petitioner states that Stanley Van Wey is not the natural father of the infant Defendant and that the natural father of the infant Defendant is unknown. However, due to the marital relationship Stanley Van Wey is made a party to this action so that any parental rights he may have to the infant Defendant may be terminated.

6. The Petitioner, CHRISTINE VAN WEY, states that the Defendant Stanley Van Wey has never acknowledged the infant Defendant and therefore has abandoned and deserted same.

7. The Petitioner, CHRISTINE VAN WEY, states that it will be in the best interest of the infant Defendant, BABY BOY VAN WEY, to have the parental rights of the Defendant, Stanley Van Wey, terminated, and to have the care, custody and control of the infant Defendant, BABY BOY VAN WEY, placed in the home approved by the Department for Human Resources.

8. The Petitioner, CHRISTINE VAN WEY, states that the couple approved by the Department for Human Resouces, Commonwealth of Kentucky, has adequate facilities available and is willing to accept the care, custody and control of the infant Defendant, BABY BOY VAN WEY.

9. The Petitioner, CHRISTINE VAN WEY, states that the infant Defendant, BABY BOY VAN WEY, has no guardian, curator or committee appointed for him in this state or elsewhere.

10. The Petitioner, CHRISTINE VAN WEY, states that the Defendant Stanley Van Wey, is a nonresident of Kentucky and is known to be absent therefrom and his last known address is 128 Sheridan, Muscatine, Iowa 52761.

WHEREFORE: The Petitioner, CHRISTINE VAN WEY, prays:

1. That a guardian ad litem be appointed to accept service of summons for the infant Defendant, BABY BOY VAN WEY, and to represent him when he is properly before the Court.

2. That a Warning Order and Military Attorney be appointed to attempt to locate the Defendant, Stanley Van Wey, for the purpose of informing him of the nature and pendency of this action;

3. For a judgment terminating the parental rights of CHRISTINE VAN WEY to the infant Defendant, BABY BOY VAN WEY.

4. For a judgment terminating all of the parental rights of the Defendant, Stanley Van Wey, to the infant Defendant, BABY BOY VAN WEY, and that the care, custody and control of the said infant be granted to and vested in the couple approved by the Department for Human Resources, Commonwealth of Kentucky.

5. For any and all other relief to which the Petitioner, and the infant Defendant, BABY BOY VAN WEY, may appear entitled.

(s) Christine Van Wey
Christine Van Wey

I, CHRISTINE VAN WEY, hereby certify that I have read the foregoing petition and that all allegations contained therein are true to the best of my knowledge and belief.

(s) Christine Van Wey
Christine Van Wey

(s) Katie M. Brophy
Katie M. Brophy
Attorney at Law
Suite 200
123 South Seventh Street
Louisville, Kentucky 40202
Phone: (502) 583-1711

I, the undersigned Clerk of Jefferson Circuit Court do certify that the foregoing Petition for Voluntary Termination of Parental Rights, Petition for Involuntary Termination of Parental Rights and Affidavit for Appointment of Warning Order and Military Attorney was this day acknowledged before me in said State and County and was delivered, sworn, acknowledged and signed by the Petitioner, CHRISTINE VAN WEY, to be her free and voluntary act and deed for the purposes therein contained.

Paulie Miller, Clerk
Jefferson Circuit Court

By: Marfa Jones
Deputy Clerk

Jan. 27, 1981

Date

APPENDIX E

JEFFERSON CIRCUIT COURT

SIXTH DIVISION

No. 81-AD-0037-T

CHRISTINE VAN WEY - - - - - *Petitioner*
503 Park Avenue
Muscatine, Iowa 52761

v.

STANLEY VAN WEY,
BABY BOY VAN WEY - - - - - *Defendants*

PETITION FOR IMMEDIATE ENTITLEMENT POSSESSION AND CUSTODY—Filed April 30, 1981

Comes the Petitioner, Christine Van Wey, by counsel, and for her petition for immediate entitlement, possession and custody states as follows:

1. Petitioner is the natural mother of infant child Baby Boy Van Wey, born on January 22, 1981.

2. Petitioner was legally married to Respondent, Stanley Van Wey, at the date of birth of said child.

3. John W. Adler is the natural father of said infant child.

4. The Court record of the above-styled case contains no order terminating the rights of any of the persons named in paragraphs one, two and three above.

5. On January 27, 1981, Petitioner signed a petition to voluntarily terminate her parental rights to said infant child.

6. That petition was signed under extreme duress at a time when Petitioner was emotially upset, physically weakened, and financially destitute, miles from her home; Petitioner was also in fear for the well-being of her other two children. (See Petitioner's Affidavit attached herein as Exhibit 1.)

7. Due to severe financial hardship and emotional strain, before the baby was born, Petitioner hired Katie Marie Brophie, attorney at law, to represent her in terminating her parental rights.

8. Immediately after Ms. Brophie removed the baby from the hospital, Petitioner realized she did not want to give up her child.

9. Petitioner attempted to get the baby back by contacting the Department for Human Resources, the Louisville Bar Association, and the Legal Aid Society, Inc., for help.

10. Petitioner told Ms. Brophie that she no longer wished to terminate her rights, and that she had a new attorney to represent her, but nevertheless, Ms. Brophie coerced Petitioner to sign the voluntary termination papers. (See Exhibit 1, paragraph 3.)

11. Petitioner would not have signed the petition for voluntary termination but for undue pressure placed upon her at a time when she was emotionally upset, physically weakened, and financially destitute, miles from her home.

12. Petitioner is presently physically, emotionally and financially able to care for her baby, and she is the fit and proper person to have possession and custody of said child.

13. Although Petitioner did not freely give consent to terminate her parental rights, she hereby revokes said "consent", such as it was.

WHEREFORE, Petitioner prays this Court grant her immediate entitlement, possession and custody of infant child, Baby Boy Van Wey.

Tendered By:

(s) Ellen G. Friedman
Ellen G. Friedman
Attorney for Petitioner

(s) Robert Frederick Smith
Robert Frederick Smith
Attorney for Petitioner
Legal Aid Society, Inc.
425 West Muhammad Ali Blvd.
Louisville, Kentucky 40202
Telephone: (502) 584-1254

CERTIFICATE

I hereby certify that a copy of the foregoing Petition was on the 29th day of April, 1981, mailed to Mr. Charles Dobbins, Attorney at Law, 2310 First National Tower, Louisville, Kentucky 40202, and Mr. and Mrs. Raymond O'Neal (a/k/a Donna & Frank O'Neal), Route #2, Bedford, Kentucky 40006.

(s) Ellen G. Friedman
Ellen G. Friedman
Attorney at Law

APPENDIX F

JEFFERSON CIRCUIT COURT

SIXTH DIVISION

No. 81-AD-0037 T

CHRISTINE VAN WEY - - - - - *Petitioner*

v.

STANLEY VAN WEY,
BABY BOY VAN WEY - - - - *Defendants*

AFFIDAVIT—Filed April 30, 1981

I, Christine Van Wey, after being duly sworn, hereby state as follows:

1. Under great duress and pressure from Katie Brophie on her own, and through her secretary, Sandy Hafer, I signed papers which terminated my parental rights to my new-born son.

2. My two other children, my car, and my personal belongings were at the home of Sandy Hafer, with whom I had lived for a time while awaiting the birth of my baby. While I was still in the hospital recovering from my caesarean section, I changed my mind and decided to keep my baby. Sandy Hafer called me at the hospital and told me that if I did not sign the termination papers, she would leave my children someplace and not tell me where, and that she would hold my car and personal belongings so that I could not get them.

3. Katie Brophie told me that I had to sign the termination papers at 10:00 a.m., ~~February~~ 2, January 27, CVW

1981. I told her that I had an appointment with my attorney at the Legal Aid Society, Ellen G. Friedman, that afternoon, and I wished to consult with her first. She told me that Legal Aid could not help me, and that if Legal Aid tried, she would sue my attorney there. Katie Brophie knew that I was penniless and had no place to stay, and she agreed to give me One Hundred and Fifty Dollars ($150.00) for transportation back to Iowa, if I signed the papers. She said that if I did not sign the papers that she would leave me stranded here in Louisville.

(s) Christine Van Wey, Affiant

Subscribed and sworn to before me this 20th day of February, 1981, by Christine Van Wey, Affiant.

My Commission Expires: September 30, 1982.

(s) Terrence L. Mealy
Notary Public, State-at-Large, Iowa

APPENDIX G

JEFFERSON CIRCUIT COURT

SIXTH DIVISION

No. 81-AD-0037-T

CHRISTINE VAN WEY - - - - - - *Petitioner*

v.

STANLEY VAN WEY,
BABY BOY VAN WEY - - - - - - *Defendants*

AFFIDAVIT—Filed April 30, 1981

Comes the Affiant, Martha Nall, and after being duly sworn, states as follows:

I am a registered nurse employed as the Obstetrical Nursing Supervisor at Norton-Children's Hospital.

On Thursday, January 22, 1981, I was called to the nursing office because of a problem on the post-partum unit. When I arrived, Katie Brophie was angrily insisting that Christine Van Wey be moved off the maternity floor. I checked with Ms. Van Wey and found that she did not wish to move off the maternity floor, and, since the attending physician's orders allowed her this choice, she was not moved.

I again saw Christine Van Wey on Monday, January 26, 1981, immediately before she left the hospital. I was called to the floor by the nurse on duty who reported to me that Ms. Van Wey had changed her mind about giving up her baby. I attempted to get Ms. Van Wey some help as she told me she had no money and that her car was being held

at the home of Katie Brophie's secretary. I eventually reached Mary Krider who agreed to assist Ms. Van Wey.

During the time I was with Ms. Van Wey she appeared frightened, upset and quite agitated.

(s) Martha Nall
Affiant

SUBSCRIBED AND SWORN to before me by Martha Nall, Affiant herein, on this the 9th day of April, 1981.

My Commission expires: July 27, 1984.

(s) Marie A. Farmer
Notary Public, Jefferson County, Kentucky

[SEAL]

APPENDIX H

JEFFERSON CIRCUIT COURT

SIXTH DIVISION

No. 81-AD-0037-T

CHRISTINE VAN WEY - - - - - *Petitioner*

v.

STANLEY VAN WEY,
BABY BOY VAN WEY - - - - - *Defendants*

AFFIDAVIT—Filed April 30, 1981

Comes the Affiant, Muff Dubose, and after being duly sworn, states as follows:

I am employed by Norton Children's hospital as a patient representative. I was called to the maternity floor on Monday morning, January 26, 1981, to assist Christine Van Wey. Ms. Van Wey had changed her mind and wanted her baby back. I spent most of the morning with her trying to help. Throughout the morning Ms. Van Wey was crying and wringing her hands. She appeared terrified and seemed very distraught.

(s) Muff Du Bose
Affiant, Muff Dubose

Subscribed and sworn to before me by Muff Dubose, on this 25th day of March, 1981. My commission expires: October 24, 1983.

(s) Jane H. Benson
Notary Public, State at Large-Ky.

APPENDIX I

JEFFERSON CIRCUIT COURT

SIXTH DIVISION

No. 81-AD-0037-T

CHRISTINE VAN WEY - - - - - *Petitioner*

v.

STANLEY VAN WEY,
BABY BOY VAN WEY - - - - - *Defendants*

AFFIDAVIT—Filed April 30, 1981

Comes the Affiant Jena Avery and after being duly sworn states as follows:

I am a registered nurse employed as the day-shift charge nurse of The Newborn Nursery at Norton Children's Hospital.

While I was at work, Sunday, January 25, 1981, I received a call from Katie Brophie. She inquired if the Van Wey baby was ready for discharge. I explained to her the hospital policy that the baby is not to be discharged until the mother leaves the hospital. She objected to this and demanded to speak to the doctor. I gave her his telephone number.

The doctor subsequently came to the floor and ordered that the baby be discharged after the mother, Christine Van Wey, was done seeing her baby.

I took the baby to Christine Van Wey. While Ms. Van Wey was in her room with her baby, Katie Brophie came to the Obstetrics floor and after discovering Ms. Van Wey with her baby, Ms. Brophie became extremely angry. Her

face was red and her voice was raised. Her tone of voice was very intimidating. She yelled, "What is that baby doing in there? That mother has no right whatsoever to have that baby!" She tried to get me to remove the baby from Ms. Van Wey, but I refused.

Katie Brophie claimed she was in a hurry to get the baby out of the room because there were people waiting who had to catch an airplane. She said that we, (the hospital staff), were "a bunch of nuts." Ms. Brophie disappeared for a few minutes and when she returned she said that Christine Van Wey was done with the baby and I should go get him.

Katie Brophie was loud, pushy, rude, intimidating, and appeared desperate to get Ms. Van Wey's baby away from her.

(s) Jena Avery
Affiant

Subscribed and sworn to before me by Jena Avery, this _____ day of _____, 1981. My commission expires: _____.

_____
Notary Public, State at Large-Ky.

APPENDIX J

[6]

Q. 1. Would you state your name, please?

A. Jena Avery.

Q. 2. And, what is your occupation?

A. I'm a registered nurse.

Q. 3. Where are you employed, Ms. Avery?

A. Norton-Children's Hospital.

Q. 4. How long have you worked there?

A. Seven years.

Q. 5. Have you had an occasion to have contact with either Christine Van Wey or her baby?

A. Yes, I have.

Q. 6. Would you describe the form of that contact?

A. She and her baby were a patient at our hospital.

Q. 7. And, how did you happen to get involved with her.

A. When her baby was delivered it was admitted to our nursery. I had contact with Ms. Van Wey the day before her baby was delivered. I had her sign the release form that released her baby to Katie Brophy upon dismissal from the hospital.

Q. 8. And, was that signed before the birth of the baby?

A. Yes, it was.

Q. 9. Are you familiar with the circumstances surrounding the discharge of the baby from the hospital?

A. Yes, I am.

Q. 10. Would you describe those circumstances?

* * * * * * *

[14]

A. Yes. If the mother requests, we do take the baby to her.

Q. 54. Did you have such a request in this particular case?

A. Yes, we did.

Q. 55. Who'd you have the request from?

A. Christine Van Wey.

Q. 56. And, do you know when it was that you got this request?

A. She told me when I had her sign the release paper the day before the baby was delivered, she did plan to see her baby.

Q. 57. Ms. Avery, I believe that you have previously signed an affidavit that's been filed in this case?

A. Yes.

Q. 58. Did you prepare this affidavit?

A. I believe Ms. Ellen Friedman did.

Q. 59. She prepared it?

A. I talked with her and gave her my deposition, and she's the one who mailed it to me, I believe.

Q. 60. She mailed it to you?

A. I believe so.

Q. 61. This is a copy. Is that your signature?

A. Yes, it is.

Q. 62. And, when did Ms. Friedman talk to you about this?

A. I don't know the date.

Q. 63. Do you know when you signed it?

* * * * * * *

APPENDIX K

JEFFERSON CIRCUIT COURT

SIXTH DIVISION

No. 81-AD-0037-T

CHRISTINE VAN WEY - - - - - *Petitioner*

v.

STANLEY VAN WEY,
BABY BOY VAN WEY - - - - - *Defendants*

AFFIDAVIT—Filed April 30, 1981

I, Mary Krider, after being duly sworn, hereby state as follows:

1. I am presently employed by the Louisville Area Family Planning Council and was formerly employed as an adoption worker with the Department of Child Welfare (now the Department for Human Resources).

2. In an individual capacity, outside the scope of my employment, I became acquainted with Christine Van Wey's situation.

3. On January 26, 1981, I was contacted at my home by Martha Nall, Obstetrical Nursing Supervisor at Norton-Children's Hospital. Ms. Nall asked me if I could assist Ms. Van Wey, particularly in recovering her children and car.

4. I drove Christine Van Wey to the home of Sandy Hafer, where Ms. Van Wey's car was parked. She tried to start the car, but the engine would not "turn over".

5. I then drove her to get her two children at the school they were attending.

6. I then drove her to a police station to try to enlist help in securing her personal belongings, at the home of Sandy Hafer, and her car, which Ms. Van Wey believes had been tampered with.

7. I drove her back to my office and assisted her in securing legal assistance to get her baby back.

8. We later returned to Sandy Hafer's home, after Ms. Van Wey's Legal Aid attorney, Ellen G. Friedman, reported her conversation with Ms. Hafer, indicating that Chris Van Wey could now pick up her belongings and car. When we arrived, the car was filled with her belongings, and started immediately.

9. During the entire time we were together, Christine Van Wey appeared to be under a great strain, both physically and emotionally, and had difficulty walking and held her stomach as if in pain. She was visibly upset and crying. She seemed depressed and discouraged, asking me if Katie Brophy and her secretary could really carry out their threats.

10. Christine Van Wey indicated to me that she wanted her baby and it is my belief that she voluntarily terminated her parental rights only as a result of intolerable duress.

(s) Mary Krider, Affiant

STATE OF KENTUCKY }
COUNTY OF JEFFERSON }

Subscribed and sworn to before me by Mary Krider this 19 day of Feb., 1981.

My Commission expires 4-9-83.

(s) Catherine M. Ford
Notary Public, State at Large, KY

APPENDIX L

Exhibit 2

[LETTERHEAD OF STATE OF IOWA, DEPARTMENT OF SOCIAL SERVICES]

June 10, 1981

Honorable Judge Jack E. Mudd
Circuit Court, Sixth Division.
Hall of Justice
Jefferson County
Louisville, Kentucky 40202

Re: VAN WEY, Christine

Your Honor:

This is in response to your order for a Home Evaluation, and a followup to our letter by Frances McRoberts of June 5, 1981.

We felt a brief description of the Van Wey home situation might assist you preliminarily, at your hearing scheduled for June 17, 1981.

I met with Christine Van Wey in my office on June 5, 1981 and at her home on June 8, 1981.

HOME

Christine Van Wey rents a large ground level apartment at 503 Park Avenue in Muscatine, Iowa. There is a large kitchen, bathroom, living room and two large bedrooms. There is a large foyer area off the bedrooms that could serve as a third bedroom and is perfectly adequate for a young child.

Mrs. Van Wey rents this apartment for $80.00 per month (Low Rent Housing program). She is currently renovating it, stripping floors and woodwork, wallpapering, etc. This project is completed except for the girls bedroom and kitchen. She also has a full unfinished basement which the

girls use for riding toys in the cold weather. The home is quite adeqate to accommodate another child.

CHILDREN

Mrs. Van Wey has two daughters:

Jennifer Van Wey, b.d. 8/23/73
Chelese Van Wey, b.d 9/9/75

Both girls appear to be normal, healthy, active children. They were clean and well dressed. They interact with their mother appropriately—seek affection, attention and ask permission to do things. They respond to her requests or orders. Both seem happy and secure with their mother.

Mother reports that Jenny's grades suffered during the confusion this past year but have improved this last semester. Otherwise she loves school.

REFERENCES

Mrs. Van Wey gave two references. Both gave positive feedback. One, Kathy Gray, has provided child care for these two children intermittently over the past seven years while Mrs. Van Wey has been employed. Kathy Gray stated that even when Christine went to work at 6:00 or 7:00 AM, she had the children dressed and fed before they arrived in the morning.

FATHER

Baby Boy Van Wey's father is reported by Christine to be one John Adler, a 41 year old person with whom she has had a relationship for the past four years. Mr. Adler lives with Mrs. Van Wey. He was unavailable to interview, because he works very long days.

MOTHER

Christine Van Wey admits she was very confused and distraught during the last trimester of her pregnancy. She was considering releasing for adoption until shortly after delivery.

She certainly appears to be settled and able to provide for her baby at this time. She also realizes the difficulties involved for the baby, the adoptive parents, as well as herself and her daughters.

SUMMARY

1. Mrs. Van Wey is able to undertake the care of her child.
2. The issue appears to be an entirely legal and ethical one at this point.
3. The Iowa Department for Social Services, Muscatine County Office, will, by Court Order, provide supervision of this child in the mother's home, should the Court decide to return him. If so, I suggest custody be maintained by your Court for a period of time (6 months?), with our Department reporting to you.
4. That if the child is returned to the mother and then must be placed for adoption, that he be returned to the family with whom he was originally placed.

If you have any questions about my report, please feel free to contact me.

Respectfully submitted,
(s) Kay Jackman
Social Worker III

KJ:de

APPENDIX M

Exhibit 3

[LETTERHEAD OF CITY OF MUSCATINE]
June 9, 1981

Honorable Jack Mudd
Judge of Jefferson Circuit Court
Sixth Division
Hall of Justice
Louisville, Kentucky 40202

Honorable Jack Mudd:

My office was contacted to reinspect this rental unit occupied by Christine Van Wey and her daughters at 503 Park Avenue. I have found Ms. Van Wey to be an excellent housekeeper. The unit she occupies has been a rental unit for quite some time and had become pretty run-down by the time she moved in. Since she moved in, the unit has not only been thoroughly cleaned, but she has also proceeded to restore most of the floors and woodwork to their original wood finish. In the process of cleaning, she has also wallpapered or painted three of the five rooms they occupy and is now working on the fourth. This has all been done within the last seven months.

I am, therefore, happy to send this recommendation for her. We wish all our rental units were cared for in the same manner.

Sincerely,
(s) Madalyn A. Figg
Housing Code Officer

xc: Christine Van Wey

APPENDIX N

JEFFERSON CIRCUIT COURT

SIXTH DIVISION

No. 81-AD-0037-T

CHRISTINE VAN WEY - - - - - - *Petitioner*

v.

STANLEY VAN WEY, et al. - - - *Respondents*

OPINION AND ORDER—Entered June 22, 1981

The petitioner, Christine Van Wey, a resident of Muscatine, Iowa, mother of two children, 5 and 7 years of age, is seeking the return to her of a child born to her at Norton's Hospital in Louisville, Kentucky, on January 22, 1981, by a petition for possession and immediate entitlement.

Based on prior arrangement between them, under which Christine Van Wey came to Louisville, Kentucky for the purpose of giving birth to her child and placing him for adoption through her attorney, Katie Brophy, on Sunday, January 25, 1981, Katie Brophy took the child from the Norton Hospital and placed him with a couple in Trimble County, Kentucky, who planned to adopt him.

On January 27, 1981, Christine Van Wey, with her attorney, Katie Brophy, appeared before this Court with a petition to voluntarily terminate her parental rights, that had been signed by her, earlier that morning, at the direction of her attorney, before a deputy circuit clerk.

Even though the appearance was made, no order was entered then or has since been entered, terminating the

parental rights of Christine Van Wey. Consequently, there was no change in the custody status of Christine Van Wey as the mother of the child involved in this matter. Also, none of the events brought out by the evidence in the trial of this case before this Court were made known to the Court during the above appearance and proceedings by either the attorney, Katie Brophy, or by the petitioner herself. The events of the day before were not disclosed.

When the father of her child, with whom she had been living, abandoned her without funds in the fifth month of her pregnancy, Christine Van Wey, in a state of desperation and in the belief that she could not provide for this third child, sought outside help. Being unable to find acceptable help in Iowa, she turned to Katie Brophy, an attorney, to help her place her child for adoption. She learned of Katie Brophy through a television program she saw about that time, concerning Miss Brophy's activities in the field of surrogate parenting.

An arrangement was made by which the prospective adopting couple would assume payment of her medical fees and costs, and, in addition, would pay legal fees of Katie Brophy.

Receiving $100.00 from these participants to cover her expenses, Christine Van Wey and her two children drove to Louisville, Kentucky in her car. On arriving and being unable to find a place to stay, she made arrangements with Sandy Hafer, secretary to Katie Brophy, to take up residence in her home, also occupied by Mrs. Hafer's husband and two children, in return for household services she was to render.

Several weeks later, Mrs. Van Wey entered the Norton's Hospital and on January 22, 1981, she gave birth to a baby boy a cesarean section. Prior to the birth of the child, she had signed a release of the child to the hospital.

Following the birth, nurses at the hospital permitted the mother to have the child with her. It is, perhaps, this repeated contact that brought about the process of "maternity infant bonding" and through this emotional development emerged her change of mind about giving up the child for adoption.

This contact between the mother and child was strongly objected to by Katie Brophy, who was directing the placing process and acting as attorney for the mother. In spite of the objection, the change of mind did occur and it was made known later that day to both the attorney and her secretary. This brought about a heated conversation between the mother and Miss Brophy's secretary, in which some threats were made concerning Christine Van Wey's children, automobile and personal belongings.

Christine Van Wey became concerned that her two children would be taken from her and, in this state of mind, she immediately sought to have herself discharged from the hospital, over objection of the attending physician because of her condition as the result of the cesarean.

Two of the nurses and the chaplain at the hospital talked to her about the matter, offered her some limited help, and all testified in her behalf and totally supported her version of the case with respect to her state of mind and concern, as well as her change of mind about the adoption.

The child was removed from the hospital on Sunday, January 25, 1981. The next day, January 26, 1981, Christine Van Wey left the hospital and proceeded to get her children. Through the chaplain at the hospital, a social worker with the Louisville Family Planning Council stayed with her that entire day, giving her what help she needed and drove her to Sandy Hafer's house to pick up her car. The car could not be started, and both of them left without any attempt to contact anyone there at the house. Both of them went to the school and picked up the children.

Contact was made with an attorney at the Legal Aid Society and, through the attorney, they went again to the house of Sandy Hafer and this time all her personal belongings were in the back of her car and the car started. At this time, she had her car, personal belongings, and the two children, but had no place to go. They were then taken to a shelter house on Brook Street in Louisville, Kentucky, where they stayed overnight. It was here that the social worker left them.

Up to this point there is no question about Christine Van Wey's changing her mind about the adoption, which she had a right to do. Her fears about her children up to this point were well supported by the testimony of the nurses, chaplain, and the social worker who stayed with her throughout the entire day on Monday, January 26, 1981, into the evening, when she left her at a place to stay.

However, from here on the facts become vague and conflicting.

Christine Van Wey had the support of several people who were offering her help and assisting her in various ways. That Monday afternoon she had made an appointment to see her attorney the next day, on Tuesday, January 27th, concerning her baby. It was also on that afternoon that her attorney at Legal Aid notified Katie Brophy that they wanted the baby back and were planning to take legal steps to accomplish this. A social worker left Christine Van Wey with her childen and belongings and a place to stay overnight. She knew the people who wanted to help her and how to reach them. None of them heard any more from her from that time on. Although she had an appointment to see her attorney the next day about getting her baby, she never called the attorney or kept the appointment. Instead, she showed up the next day, on the 27th, at the Hall of Justice, the Circuit Court Clerk's office, with her children, and signed a petition and then appeared,

along with Katie Brophy as her attorney, before this Court for the purpose of terminating her parental rights.

None of the events which occurred on the day before and the day prior, Sunday, were brought to the attention of this Court by either Miss Brophy or by Christine Van Wey. Both appeared, without an appointment, with a petition voluntarily terminating the parental rights of Christine Van Wey, which had been signed by her before a circuit clerk that morning. This Court had them wait about twenty minutes in his courtroom, while he checked with the Department for Human Resources and the Jefferson County Department for Human Services concerning any existing regulations as to non-resident mothers coming to this state for the sole purpose of giving birth to children for adoption. Finding no existing restriction against such proceeding within this state, the Court called the parties into chambers and a hearing was held. For a while, Christine Van Wey was alone in the courtroom and had occasion to see my secretary. At no time did she voice any suggestion to any member of my staff that she wanted to confer with me in private. No objections or concern were raised by anyone. Christine Van Wey answered a few questions, satisfying the court that she understood the nature of the proceedings and that she voluntarily wanted to terminate her parental rights for the purpose of having her child adopted. This Court was never advised by either Christine Van Wey or Katie Brophy that the mother was having any second thoughts about adoption. There was nothing to suggest to this Court that Christine Van Wey was operating under any fear and if she was she had ample opportunity during the absence of Katie Brophy, while she waited in the courtroom, to have made some statement either to me or to a member of my staff.

Christine Van Wey, in her testimony, stated she did not want to attempt adoption in Iowa because of having to

advertise for the child's father and did not know his whereabouts. Yet, while living here in Louisville she made phone calls to Iowa and located the father through some connection she had at a poolroom. Although the father abandoned Christine Van Wey in her fifth month of pregnancy, yet, while she lived in Louisville, the father moved back into the apartment of Christine Van Wey in Muscatine, Iowa.

Following the hearing on January 27, 1981, the father, John Adler, filed an affidavit under date of February, 1981, stating his willingness and ability to accept and provide for the child.

In order to accomplish an adoption in Kentucky, a notarized written consent of the birth parent must be obtained or the parental rights of the birth parent must be terminated by an order of court. Absent either, the adoption may be concluded upon proof of facts as would support an order of termination in an involuntary termination action against either or both birth parents.

If Christine Van Wey was acting under duress or threat when she appeared before this Court on January 27, 1981, then such petition of termination should not be entered.

The couple who have the child received him under written permission of the Kentucky Department for Human Resources as approved parents for adoption. There is no issue over their suitability and there is no showing that they are holding the child illegally or wrongfully.

Christine Van Wey has taken all necessary steps to conclude the voluntary termination of her parental rights. It is true that no such order has been entered. No such order was tendered at the time of the hearing, for the reason that her husband had to be named a defendant by reason of the birth of the child during their marriage and that he could not be brought before the court under constructive service until after the expiration of fifty days. It was then that it was contemplated that an order of

termination would be tendered and entered terminating the rights of both parties.

Now, since John Adler has now been disclosed as the actual or birth father of the child, it will be necessary that he be joined as a defendant under KRS 199.480(b). Under this provision of the statute and the decision of the U. S. Supreme Court in *Illinois* v. *Stanley*, either his consent will have to be obtained or his right as a putative father will have to be terminated either voluntarily or by involuntary proceedings.

The petition prepared by Miss Brophy, as attorney, and signed by Christine Van Wey, alleges that the name of the actual father was unknown. The testimony of this case reveals that Christine Van Wey had full knowledge of who he was.

Christine Van Wey places great weight on her claim that she acted in fear of something happening to her children. Perhaps, following her conversation on Sunday, January 25, 1981, with Katie Brophy and Sandy Hafer as to the changing of her mind about the adoption and their heated reaction thereto, did give rise to her fear and this appears to be borne out by the testimony of the nurses and the social worker.

Yet, on the day when legal steps were to be taken to get her baby back, she dropped all contact with her attorneys, who are again representing her in this case which began some four months later. Also, she apparently made no effort to call those at the hospital or the social worker who offered her help on that Sunday and Monday. Failing to hear from her, the social worker made repeated efforts to contact her and to find out what happened. This is unexplained.

In addition, Christine Van Wey said nothing about her concerns and fears while in Court, even while she was alone outside the presence of Miss Brophy while waiting in the

courtroom. This action on her part raises a serious question in the mind of this Court as to the validity of her fear at that time. Her statement that she failed to speak up in court for fear of threats to her children is not consistent with the ability she demonstrated to speak up on the two days before and more so inconsistent when she had available to her several persons willing to assist and help her.

One thing is certain, she was not acting under any threat or fear when she took steps or made arrangements to have her child adopted.

Better practice would have had the child placed after an order of termination was obtained. Also, better practice would call upon the attorney, at the time of the termination proceedings, to reveal to the court the turmoil of the day and a half before, so that any doubts or questions could have been clearly aired and dealt with in an appropriate manner.

In such proceedings as this when the attorney holds herself out as a locater and an arranger for adoption of children, it is difficult to define her role as an attorney and who she is representing and to who she owes a duty in representing one or the other as an attorney. At one point it appears that her interest as an attorney is placed between the conflicting interests of the mother on one hand and the prospective adopting couple on the other. This is very tragic and some steps of professional measures will have to be taken in order to assure that a situation like this will not reoccur.

It is in this area of private adoptions that conflicts such as in this case occur and when it does occur, it creates a tragic result, affecting and leaving lasting scars on the lives of many people.

Christine Van Wey arrived here totally dependent upon others for the needs of herself and her two children and in a state of desperation. This should not happen here or else-

where. A close look should be given our adoption laws that permit a non-resident, who is in indigent circumstances and in a desperate state of need, to come to this state for the sole purpose of giving birth to a child to be adopted. Under such conditions, she is made subject to those who arrange to bring her here. At present, our state laws tolerate it and our Department for Human Resources grants permission for the acceptance of such children for adoption. No thought or investigation is made as to the mother or her welfare.

The final and most important factor in reaching a decision in this case is the best interest of the baby himself. This should be of paramount concern and no decision can be or should be made in conflict with this best interest.

The child has been with the family under placement for adoption for about six months and the family has been investigated and approved as a suitable home.

Christine Van Wey's decision in seeking adoption for her child was on the basis that she could not provide for him and at the same time provide for her two daughters living with her. The father of the child abandoned them in the fifth month of her pregnancy. Yet, while she was living here in Louisville, awaiting the birth of her child, the father moved back into her apartment in Muscatine, Iowa.

Christine Van Wey does some work as a babysitter and assists John Adler two days a week as a clam digger, for which they receive $30.00 a ton. There is no indication what their weekly or monthly income is.

There has been a long bonding relationship between the child and his present family, of about six months. There is no showing that either party does not love the child. The interrelation and interaction between the child and the family has not been questioned. To remove this child would no doubt disturb an already established relationship within that family. This would have a detrimental effect

upon the child, as well as upon the family. This court will stand corrected if such is shown to the contrary.

In all cases such as this, someone is always hurt. For this court to reach a decision, it has been a matter of deep and prolonged concern. It is not expected that all parties and those concerned will equally accept the result brought about by the decision of the court or the decision itself. This is understandable. Yet, in spite of what may be looked upon by some as a harsh result, a decision must be made. This matter is before the Court on the sole question of possession and immediate entitlement to custody of the child of Christine Van Wey. Any adoption action as may be taken must occur in the Circuit Court of Trimble County, Kentucky, the place of jurisdiction for such action.

Accordingly, the following order is entered.

ORDER

This matter having come before this Court on a petition for immediate possession and entitlement to custody, and a trial being held at which testimony was presented in the presence of all parties and their counsel, and, in accordance with the foregoing opinion and findings of this Court based on the evidence presented and the Court being sufficiently advised, IT IS ORDERED AND ADJUDGED as follows:

1. This Court finds that the O'Neal family is not holding the child involved herein in their possession illegally or improperly.

2. Christine Van Wey, the mother of the child involved, has taken all necessary legal steps to complete the voluntary termination of her parental rights and such steps taken by her before this Court were not the result of threats of duress at that time.

3. The petition of Christine Van Wey for immediate possession and entitlement to custody of her child be and is hereby denied.

4. The pending termination action shall remain on the Court's docket, subject to further orders of Court.

5. The rights of the natural father of the child involved herein must be resolved within the provisions of KRS 199.480(b).

(s) Jack E. Mudd
Date: June 22, 1981.

cc:

Ellen Friedman and
Robert Frederick Smith
Legal Aid Society, Inc.
Attorneys for Christine Van Wey

Irene P. Long and
Stephen P. Smith, Jr.
Attorneys for Respondents, O'Neal

Charles W. Dobbins, Jr.
Guardian Ad Litem

cc: 6/23/81

Ms. Frances McRoberts
Service Supervisor
Iowa Department of Social Services
Muscatine, Iowa 52761

APPENDIX O

JEFFERSON CIRCUIT COURT

SIXTH DIVISION

No. 81-AD-0037-T

CHRISTINE VAN WEY - - - - - *Petitioner*

v.

STANLEY VAN WEY, ET AL. - - - *Defendants*

SUPPLEMENTAL FINDINGS OF FACT AND CONCLUSIONS OF LAW—Entered July 8, 1981

This action is before the Court on motion of,

1) Petitioner, Christine Van Wey, to modify the Court's findings and made further findings herein; and

2) Respondents, Frank and Donna O'Neal, to terminate the parental rights of Christine Van Wey and her husband, Stanley Van Wey, in and to the child involved herein; and

3) Respondents, O'Neal, to file a cross-petition joining John Adler herein as cross-defendant for the purpose of involuntarily terminating his parental rights, for the reason that he has filed an affidavit asserting paternity to the child involved herein.

On the basis of the affidavit he has filed, John Adler is alleged to be the putative father of Baby Boy Van Wey who is now in the custody of the O'Neals for the purpose of adoption.

KRS 199.480 requires that the putative father be named as party defendant to any adoption action and his consent is required under KRS 199.500, but shall not be required if his parental rights have been terminated.

Christine Van Wey did not join John Adler as a defendant to terminate his rights in her petition to voluntarily terminate her parental rights. Instead, she joined her husband by reason of the birth of the child during her marriage, on the legal presumption that he is the father of the child. In fact, she alleged the father of the child to be unknown.

The question presented is whether proposed adopting parents may join the putative father in a petition to involuntarily terminate his parental rights.

The right to file an adoption action and to file a termination action is fixed by the state legislature, and short of that such action could not be filed.

The legislature enacted KRS 199.603(7), which defines who may file or institute such involuntary termination action. This right is limited to:

> ". . . the department, any child-placing agency licensed by the department, any probation officer, any state or local law enforcement officer, any county or commonwealth's attorney or parent."

The O'Neals do not come within any of those groups set forth in the statute. Consequently, their motion to file the cross-petition joining John Adler as a party herein is hereby denied.

This Court in its opinion, on page 12, stated,

> "The final and most important factor in reaching a decision in this case is the best interest of the baby himself. This should be of paramount concern and no decision can be or should be made in conflict with his best interest."

Clearly, the best interest of this child directs that his custody remain with the O'Neals, where he has been living since shortly after his birth.

This Court denied the petition of Christine Van Wey for immediate possession and entitlement to custody. This opinion still stands and petitioner's motion to modify same is overruled. Accordingly, the permanent custody of the child should be and is hereby vested with Mr. and Mrs. O'Neal. *Moore* v. *Dawson,* Ky., 531 S. W. 2d 259; *Paynter* v. *Smith,* Ky., 481 S. W. 2d 270.

This Court in its opinion containing its findings of fact and conclusions of law adjudged in part, as follows:

> "Christine Van Wey, the mother of the child involved has taken all necessary legal steps to complete the voluntary termination of her parental rights and such steps taken by her before this Court were not the result of threats or duress at that time."

Christine Van Wey, in a proceeding before this Court and under circumstances which established before this Court her full understanding of the proceedings in which she declared her willingness to terminate her parental rights, thereby completed all steps necessary to conclude the termination. The entry of the order was withheld until her husband, a defendant, was before the Court by constructive service. This has now been accomplished; he has filed no response although he has knowledge of the proceedings. There is clear evidence before this Court to warrant termination of his parental rights.

KRS 199.611 provides that if the Court determines that all parties are before the Court and that the termination of parental rights are in the best interest of the child, and that each is fully aware of the purpose and consequences of the proceedings, it (the Court) shall make an order terminating all parental rights and obligations in the parent in whom they have existed. . . . () added.

Therefore, pursuant to the provisions of KRS 199.611 this Court enters an appropriate order terminating the

parental rights of Christine Van Wey and her husband, Stanley Van Wey, and within the provisions of that statute grants unto the Kentucky Department for Human Resources the power to consent to the adoption of such child in such proceedings as may be filed. *Com., Dept. of Child Welfare* v. *Helton,* Ky., 411 S. W. 2d 932 (p. 934).

Other motions of the petitioner to further modify the Court's original findings of fact and conclusions of law and to make further findings are hereby overruled.

This is a final and appealable order and there is no just reason for delay in its entry.

(s) Jack E. Mudd
Judge

Date: 7/8/81.

cc:
Ellen G. Friedman
Legal Aid Society, Inc.
Attorney for Petitioner

Stephen P. Smith, Jr.
Irene P. Long
Counsel for Respondents, O'Neal

Charles W. Dobbins
Guardian Ad Litem

John R. Wilson
Warning Order Attorney

APPENDIX P

JEFFERSON CIRCUIT COURT

SIXTH DIVISION

No. 81-AD-0037-T

CHRISTINE VAN WEY - - - - - *Petitioner*

v.

STANLEY VAN WEY, et al. - - - - *Defendants*

ORDER TERMINATING PARENTAL RIGHTS—

Entered August 10, 1981

At a Court held on the 10 day of August, 1981.

This cause having been heard and submitted before this court on January 27, 1981 and the Petitioner, Christine Van Wey, having personally appeared, and the Court having examined the Mother of Baby Boy Van Wey, who admitted the facts stated in her Petition to be true, and it being proved to the satisfaction of this Court that the herein termination will be for the benefit of the child, and the Court being sufficiently advised, it is hereby Ordered and adjudged; all of the parental rights of Christine Van Wey, mother of Baby Boy Van Wey, born on the January 22, 1981, in Louisville, Jefferson County, Kentucky, be and they are hereby terminated.

It further appearing to the Court that Stanley Van Wey, Respondent herein, husband of Christine Van Wey has abandoned said infant child; and continuously neglected, and failed to provide Baby Boy Van Wey with adequate food, clothing, shelter, or other care and control necessary for his physical, mental, or emotional health and develop-

ment, and it having been proved to the satisfaction of this Court that the termination of his parental rights will be for the benefit of Baby Boy Van Wey, and the Court being sufficiently advised it is hereby Ordered and Adjudged;

All of the parental rights of Stanley Van Wey, husband of Petitioner, Christine Van Wey, in and to Baby Boy Van Way, born of January 22, 1981, in Louisville, Jefferson County, Kentucky, be and they are hereby terminated.

(s) Jack E. Mudd
Judge

Dated: Aug. 10, 1981

APPENDIX Q

JEFFERSON CIRCUIT COURT

SIXTH DIVISION

No. 81-AD-0037-T

CHRISTINE VAN WEY - - - - - *Petitioner*

v.

STANLEY VAN WEY, et al. - - - - *Defendants*

NOTICE—MOTION—ORDER FOR ADDITIONAL FINDINGS AND AMENDMENT TO JUDGMENT
—Filed June 25, 1981

To: Stephen P. Smith, Jr.
Attorney for Defendants
1526 Kentucky Home Life Bldg.
Louisville, Kentucky 40202

Charles Dobbins, Jr.
Attorney at Law
First National Tower
Louisville, Kentucky 40202

Ms. Irene P. Long
Attorney for Defendants
Bedford, Kentucky 40006

Take notice that the undersigned, on June 29, 1981, at 11:00 AM, in the court room of the above Court, will make the motion and tender the order set out below.

CERTIFICATE

It is hereby certified that a copy hereof was, on June 24, 1981, mailed to the persons and addresses listed above.

MOTION

Petitioner, by counsel, pursuant to CR 52.02, moves this Court to make additional findings on the issue of whether Petitioner revoked her alleged consent to termination of her parental rights, and further, Petitioner respectfully moves this court to amend its judgment accordingly.

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(502) 584-1254

(s) Robert F. Smth
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ORDER

Motion having been made it is hereby ordered that, pursuant to CR 52.02, this court hereby amends its judgment of June 22, 1981, by granting petitioner's motion for immediate entitlement, possession, and custody of infant child Baby Boy Van Wey, in accordance with its additional findings on the issue of Petitioner's revocation of consent.

_____

Judge

_____

Date

APPENDIX R

OPINION RENDERED: MAY 28, 1982, 2:00 P.M.
TO BE PUBLISHED
AS MODIFIED: AUGUST 13, 1982; 10:00 A.M.

COURT OF APPEALS OF KENTUCKY

81-CA-2181-MR

CHRISTINE VAN WEY - - - - - *Appellant*

v.

RAYMOND F. O'NEAL,
DONNA O'NEAL and
BABY BOY VAN WEY - - - - - *Appellees*

Appeal from Jefferson Circuit Court
Honorable Jack E. Mudd, Judge
Action No. 81-AD-0037-T

REVERSING AND REMANDING

BEFORE: HOGGE, HOWERTON, and WHITE, Judges.

HOWERTON, JUDGE. Christine Van Wey appeals from a Jefferson Circuit Court order denying her petition for immediate entitlement to possession and custody of her infant son and from a supplemental order terminating her parental rights and granting permanent custody of the child to the O'Neals. She presents five allegations of error.

1. The trial court's conclusion that the appellant was not acting under duress when consenting to the termination of her parental rights was clearly erroneous.
2. The trial court erred in refusing to find that the appellant made a timely revocation of her consent to terminate her parental rights.

3. The trial court erred in applying the best interest of the child standard.
4. The trial court abused its discretion in awarding permanent custody to the appellees.
5. The trial court abused its discretion in terminating the appellant's parental rights.

After considering the complete record, we must conclude that the events and results which led to this appeal demand reversal.

The essential procedural facts are as follows: On January 27, 1981, Mrs. Van Wey signed a petition for voluntarily termination of her parental rights in the baby boy. On February 9 she wrote a letter to the trial judge informing him of some of the events which led to the execution of the petition and advised him that she did not wish to give up her child. No action was taken on the petition, and on April 30, Mrs. Van Wey filed a petition for immediate entitlement to possession and custody of the child. She asserted that the petition was signed under duress and that she was presently able to care for the child. The O'Neals were joined as respondents and a hearing was held on June 17 which resulted in the denial of the petition.

The trial court found, among other things, that although Mrs. Van Wey may have been acting under duress through January 26, 1981, she was not under duress at the time she executed the petition for voluntary termination. The court was critical of the actions of the attorney accompanying Mrs. Van Wey in that there was no revelation of the turmoil which had preceded the appearance in court, but it concluded that there was nothing to suggest that Mrs. Van Wey was operating under any fear while in court.

The court indicated that the most important consideration in reaching a decision was the best interest of the child. At the time of the court's order, the child had been with

the O'Neals for several months, and they were providing a suitable home. It was determined that to disturb the child in this established relationship would have a detrimental effect upon him, as well as upon the family. The case was left on the docket for further orders.

On June 29, 1981, Mrs. Van Wey moved the court for additional findings on the issue of whether she revoked her consent to the termination of her parental rights and for an amended judgment. Her motions were overruled, and the court entered its supplemental order awarding permanent custody of the child to the O'Neals and terminating Mrs. Van Wey's parental rights. She has now appealed her case to this Court.

The O'Neals moved to dismiss this appeal on the ground that there is no appeal from a voluntary termination of parental rights, citing KRS 199.611(2). The motion was passed to this panel for consideration with the merits of the case. We will assume, without deciding that the statute is valid, but we conclude that what appeared to begin as a petition for voluntary termination was concluded in an involuntary manner. This Court therefore has jurisdiction to consider Mrs. Van Wey's appeal.

This tragic situation began in Muscatine, Iowa. Mrs. Van Wey resided there with her two daughters. She was married to Stanley Van Wey, but the parties had been living separately for several years. Mrs. Van Wey was pregnant with her third child, and the natural father is admitted to be John Adler.

Mrs. Van Wey was in a desperate situation in that she was alone, unemployed, and unable to obtain adequate assistance. She contacted a Louisville attorney (hereinafter referred to as the attorney) whom she had seen on television discussing surrogate motherhood. Within two hours, arrangements had been made for Mrs. Van Wey to travel to Louisville and for the O'Neals to pay her ex-

penses until the birth of the child. It was agreed that the O'Neals would thereafter be permitted to adopt the infant.

The appellant was forwarded $100.00 for travel expenses and she came to Kentucky on December 3, 1980. She and her daughters resided in the basement of the home of the attorney's secretary (herein called the secretary).

The baby was delivered at Norton's Children Hospital by cesarean section on January 22, 1981. Mrs. Van Wey was permitted to see and feed her baby, and she even named it. On Sunday, January 25, the attorney obtained the child from the hospital and placed it with the O'Neals. As soon as Mrs. Van Wey learned of the baby's removal, she began taking action to effect the return of her child. On Monday, January 26, a staff physician called the secretary and informed her that Mrs. Van Wey wanted her baby returned. Mrs. Van Wey testified that the secretary telephoned the hospital and threatened to have Mrs. Van Wey's two daughters taken from her, if she refused to consent to the termination. The secretary denied doing this, but later testified that she was so upset she wasn't certain what she said. The testimony of hospital personnel supports Mrs. Van Wey's statement that she feared for the welfare and safety of her children. She left the hospital, against the advice of her attending physician, and she picked up her children at school, so that they would not return to the secretary's home.

The appellant attempted to recover her possessions and automobile, but her car would not start. A social worker assisted her in finding temporary shelter with a local charity, and she also assisted her in calling an attorney with the Legal Aid Society. An appointment was scheduled for Tuesday, January 27. The Legal Aid attorney immediately contacted the secretary and the attorney handling the baby transaction to arrange for return of Mrs. Van Wey's possessions and to advise them that she in-

tended to represent Mrs. Van Wey. Thereafter, Mrs. Van Wey recovered her possessions, which had been placed in her automobile. The vehicle was then operable.

Mrs. Van Wey contacted the attorney on Monday night regarding her baby and some of her possessions which were not in her car. We have no way of knowing exactly what took place between the two at that time, although Mrs. Van Wey testified of threats of "conjunctions," problems for the Legal Aid attorney, and actions which the attorney's policeman boyfriend might take. Mrs. Van Wey nevertheless accompanied the attorney to the circuit court on the following morning where she signed the petition for voluntary termination of her parental rights. She was given an additional $150.00, which enabled her to travel back to Iowa.

There are four elements of undue influence: (1) a person who is subject to influence; (2) an opportunity to exert undue influence; (3) a disposition to exert influence, and (4) a result indicating influence. *See* Annot., A.L.R. 3d 918 § 2 (1973). All four elements appear to exist in this case. Mrs. Van Wey was in dire circumstances when she arrived in Louisville. She was dependent upon the attorney and the secretary for all her needs. Even after removing her children from the secretary's home, she was alone in the city with two children, ages five and seven, without sufficient funds to feed them or return to Iowa. She was without her baby. She obviously felt threatened by people in a position of apparent power.

A consent for voluntary termination of parental rights or a consent to adoption, like any other consent, must be given free from undue influence or duress to be effective. *Pierce* v. *Pierce*, Ky., 522 S. W. 2d 435 (1975). Although we need not, and therefore do not, specifically determine that the trial judge's finding is clearly erroneous, Mrs. Van Wey's "voluntary" consent was highly suspect at best.

She may not have shown any evidence of intimidation at the time she signed the termination papers, but in light of all the evidence, it is unlikely that her actions were completely free and independent until she was free of the attorney involved in the baby placement.

The point which is dispositive in this case is that Mrs. Van Wey made a timely revocation of any consent which she gave, even if such was originally voluntary. No final order had been entered on the petition at the time she originally notified the court of her situation nor at the time she filed her petition for immediate entitlement. Until a court actually terminates parental rights, through an appropriate order, those rights remain in effect. Kentucky law is clear that where sufficient reason is shown, there may be a revocation of consent to adopt before a final judgment is entered. *Skaggs* v. *Gannon,* 293 Ky. 795, 170 S. W. 2d 12 (1943). In this sense, there is no significant difference between a voluntary termination of parental rights and a consent to adoption.

In *Hill* v. *Poole,* Ky., 493 S. W. 2d 482 (1973), a change in circumstances constituted sufficient reason to withdraw a consent to adoption. The father had remarried, established a home, had a job, was making sufficient money to support himself and his family, and desired for his son to be with him. The revocation occurred one year after the father voluntarily left his son with his neighbors.

Sufficient reason to revoke a consent to adoption is present when the consent is given under circumstances of temporary distress. *Warner* v. *Ward,* Ky., 401 S. W. 2d 62 (1966). Temporary distress is an understatement of the situation in this case. The trial court found in this action, and we are in complete agreement, that Mrs. Van Wey was in a desperate state of need and subject to those who arranged for her travel to Kentucky for the birth and eventual adoption of her child. A change of mind by a natural

mother is not an evil, but it is to be accorded great sympathy and in the proper case encouraged and favored. *Scarpetta* v. *Spence-Chapin Adoption Service,* 28 N.Y. 2d 185, 269 N. E. 2d 787 (N. Y. Ct. App. 1971). Generally, a natural parent has the primary and superior right to the custody of offspring above all others. *Lee* v. *Thomas,* 297 Ky. 858, 181 S. W. 2d 457 (1944).

Since there was a timely revocation of consent, the trial court abused its discretion in terminating Mrs. Van Wey's parental rights. As a matter of law, sufficient reason was given to revoke the petition to terminate. In order to thereafter issue a judgment in opposition to the wishes and consent of the natural mother, the conditions required for an involuntary termination must be clearly proven. There was no finding that Mrs. Van Wey was an unfit mother. In fact, a report from the Iowa authorities was very favorable in regard to her current circumstances and ability to care for the infant and in regard to her relationship with her daughters.

It is true that in a voluntary termination, the best interest of the child is to be considered paramount. KRS 199.601(7). But, so long as the parents are fit for the care, custody and control of a child, their rights are not involuntarily terminated simply because a child's economic, social or emotional environment can be improved by placing it in another home. Such considerations have never been approved as an adequate basis for the termination of parental rights, at least in this country. *Small* v. *Andrews,* 530 P. 2d 540 (Ore. App. 1975). The trial court also considered the emotional bond that had developed between the baby and the O'Neal's during the time the child had been in their home. This may be a strong argument and consideration, but "those hoping to become adoptive parents cannot create their best argument for keeping a child's custody by thwarting a natural parent's known wishes." *Small* v. *Andrews,*

530 P. 2d 540 (Ore. App. 1975), at 545. The O'Neal's may not be allowed to benefit from their delays in returning the child.

All of the parties involved in this situation were made aware of Mrs. Van Wey's change of mind within 24 hours of the infant's removal from the hospital. The attorney notified the O'Neal's on January 26, but the O'Neal's refused to return the baby. A follow-up call at 11:30 p.m. that same night advised the O'Neal's to "sit tight," as she believed she could obtain Mrs. Van Wey's signature for a termination on the following morning.

While we sympathize with the O'Neals and have no doubt as to their parental qualifications, the record also shows that they were advised of the dangers in independent adoption by an employee of the Department for Human Resources. Furthermore, their payments to the attorney do not entitle them to a child when the rights of the natural parent have been ignored.

Should the decision of the trial court be allowed to stand, the problems facing the O'Neals are not necessarily settled. This case is further tainted with such problems as the termination of the father's parental rights. Both Stanley Van Wey and John Adler requested the court by letter not to terminate their rights. The trial court summarily terminated the rights of Stanley Van Wey, but no action has been taken involving the admitted biological father. *See,* KRS 199.480, *Goldfuss* v. *Goldfuss,* Ky., 565 S. W. 2d 441 (1978), and *Stanley* v. *Illinois,* 405 U. S. 645, 31 L. Ed. 2d 551, 92 S. Ct. 1208 (1972).

One final black mark in this case, which we cannot overlook, is the matter of legal representation provided to Mrs. Van Wey at the time she signed the petition for voluntary termination. According to the record, the O'Neals believed the attorney was representing their interest, but she testified that she was representing Mrs. Van Wey and that the

O'Neals were merely paying her fees. It appears to us that she was primarily representing her own interests on the morning of January 27. There was an obvious conflict with her "client," as she was well aware of Mrs. Van Wey's desire to keep her baby. She had even been notified by Legal Aid that Mrs. Van Wey had made an appointment to seek their representation. None of these facts were revealed to the trial judge. Although it is conceivable that the attorney thought Mrs. Van Wey had freely, independently, and voluntarily changed her mind again, the facts make such a view highly suspect, at best.

It has been held that a natural mother, not represented by counsel at the time consent to adoption is given, will not be denied the legal effect of a withdrawal when reasonable steps are taken to regain custody of her child. Neither the so-called vested rights nor the superior economic position of the adoptive parents will preclude a withdrawal of consent in such circumstances. *Skaggs, supra,* and *Small, supra.*

Our decision in this case should in no way inhibit the successful placement of children in adoptive homes when such is done through a legitimate child-care agency or when the child is placed in a home subsequent to a final termination of parental rights. This case is an example of what can happen if attorneys use the courts to conduct a baby placement business and then put their business interests or a third party's interests above those of their "client."

The problems in this case not only involve the facts and the law, but also its peculiar odium. It is the opinion of this Court that the infant child must be returned immediately to its natural mother. The alleged voluntary consent was not of a continuous nature. Even assuming the consent was voluntary and freely given at the time the petition was signed, it was properly withdrawn prior to any final action which would otherwise have terminated Mrs. Van Wey's

rights to her child. There is no basis shown, in fact or law, for an involuntary termination. The orders of the Jefferson Circuit Court are reversed, and this case is remanded for entry of a new order consistent with this opinion.

ALL CONCUR.

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APPENDIX S

COURT OF APPEALS OF KENTUCKY

No. 81-CA-2181-MR

CHRISTINE VAN WEY - - - - - - *Appellant*

v.

RAYMOND F. O'NEAL,
DONNA O'NEAL, and
BABY BOY VAN WEY - - - - - - *Appellees*

Appeal from Jefferson Circuit Court
Honorable Jack E. Mudd, Judge
Action No. 81-AD-0037-T

ORDER DENYING PETITION FOR REHEARING

BEFORE: HOGGE, HOWERTON and WHITE, Judges.

This case being submitted upon the Petition for Rehearing by appellees O'Neals and the Guardian ad litem and the Court after considering same and being sufficiently advised ORDERS that said Petitions for Rehearing be and they are hereby DENIED.

It is further ordered that the opinion rendered herein on May 28, 1982, be modified on its face, and the attached pages 1 through 13 be substituted for the corresponding pages as originally rendered.

ENTERED: August 13, 1982

(s) John D. White
Judge, Court of Appeals

APPENDIX T

TERMINATION OF PARENTAL RIGHTS

199.600 Repealed

HISTORY: 1978 H 98, § 18, eff. 6-17-78
1976 H 99, H 731, § 99; 1974 H 368, § 38, S 259, § 10; 1972 S 173; 1968 S 90; 1966 c 219; 1962 c 211, § 5; 1950 c 125, § 23

Note: For provisions similar to 199.600, see now 199.603.

199.601 Voluntary termination of parental rights; petition; hearing

Note: See also following repeal of this section eff. 7-1-82.

(1) A petition for the voluntary termination of parental rights may be filed by a parent.

(2) No petition may be filed under this chapter prior to five (5) days after the birth of the child.

(3) The circuit court shall have jurisdiction of proceedings under this chapter to terminate parental rights. A petition for voluntary termination of parental rights may be filed in any circuit court of the Commonwealth.

(4) The petition for the voluntary termination of parental rights under this section shall be verified and contain the following:

(a) Name and place of residence of each petitioner;

(b) Name, sex and date of birth of the child;

(c) Relationship of each petitioner to the child;

(d) Reasons for desiring the termination of parental rights;

(e) Name and address of the person or of the department or authorized agency to which parental rights are sought to be transferred.

A statement that the person, department or authorized agency to whom custody is to be given has facilities available and is willing to receive the custody of the child shall be filed with the petition.

(5) When a petition for the voluntary termination of parental rights is filed, the court shall set a date for a hearing thereon. The court shall require notice to be served upon the department for human resources in any case where a statement from the department of willingness to accept custody of the child has not been filed with the petition, or custody of the child is to be placed with an individual and not the department or a licensed agency.

(6) All hearings shall be held before this court, privately for the purpose of determining the facts.

(7) The best interest of the child shall be considered paramount.

(8) At the time of the hearing, the court, after full and complete inquiry, shall determine whether each petitioner is fully aware of the purpose of the proceedings and the consequences of KRS 199.601 to 199.617.

HISTORY: 1978 H 98, § 8, eff. 6-17-78

Note: See also following repeal of this section eff. 7-1-82.

CROSS REFERENCES

See Baldwin's Kentucky Practice, Vol. 4, Adoption 1.17, 3.01 et seq.

Annotations from former section

199.620 VOLUNTARY TERMINATION OF PARENTAL RIGHTS

561 SW(2d) 106 (App 1977), Hill v. Garner. A voluntary termination of parental rights constitutes a final relinquishment of all legal rights and such parent has no standing to oppose an adoption of child.

OAG 65-505. Since KRS 2.015 was intended to only amend those statutes falling within generic classification, e.g., "infant", "majority", and since CR 17.03(1), relating to actions brought by unmarried infants, uses the term "infant" and makes no reference to specific number of years, an unwed mother over eighteen can bring an action for termination of parental rights on her own, individually, and CR 17.03(1) does not apply to a person of that age.

1955 OAG 35,632. An unwed infant mother can only file an action or application to terminate her parental rights to her child through her guardian or committee, and in the absence of a guardian or committee, or their unwillingness to file such action, it must be filed by a next friend through permission of the court.

199.601 Repealed

HISTORY: 1980 c 280, § 152, eff. 7-1-82

1978 H 98, § 8

Note: See also preceding section in effect until 7-1-82.

199.603 Involuntary termination of parental rights of parent of dependent, neglected or abused child

Note: See also following repeal of this section eff. 7-1-82.

(1) In a proceeding involving a dependent, neglected or abused child, as defined in KRS 199.011, the circuit court may terminate all parental rights of the parent of such child, and declare the child to be a ward of the state, and vest the care and control of the child in the department, or in any licensed child-caring or child-placing agency or institution, if facilities are available to receive the child, and if it is pleaded and proved by preponderance of the evidence in a private hearing that the termination is in the best interest of the child based on the existence of one (1) or both of the following conditions:

(a) The child has been adandoned; or

(b) The child has been substantially or continuously or repeatedly neglected or abused.

(2) In the case of conditions described in subsection (1)(a) or (b), no finding by the court is necessary that the abandonment, neglect or abuse was intentional if in fact the abandonment, neglect or abuse occurred.

(3) Factors to be considered by the court in determining the best interests of the child in circumstances of abandonment, neglect, or abuse shall include:

(a) Emotional illness, mental illness, or mental deficiency of the parent rendering the parent consistently unable to care for the immediate and ongoing physical or psychological needs of the child for extended periods of time based on psychological or psychiatric evidence;

(b) Acts of abuse or neglect toward any child in the family;

(c) Repeated or continuous failure by the parents to provide the child with adequate food, clothing, shelter, or other care and control necessary for his physical, mental, or emotional health and development except that poverty alone shall not be grounds for involuntary termination of parental rights;

(d) If the child has been placed with the department or a child placing or child caring agency, the services provided or offered to the parent to facilitate a reunion, including the parents' testimony concerning such services;

(e) The effort the parent has made to adjust his circumstances, conduct, or conditions to make it in the child's best interest to return him to his home in the forseeable future;

(f) The extent to which the parent has maintained regular visitation or other contact with the child as part of a plan to reunite the child with the parent;

(g) The payment of a reasonable portion of substitute physical care and maintenance if financiallly able to do so;

(h) Whether additional services would be likely to bring about lasting parental adjustment enabling a return of the child to the parent within an ascertainable period of time.

(4) If the circumstances described in subsections (1), (2), or (3) of this section exist with respect to only one (1) of the two (2) parents, the parental rights of that parent may be terminated, in which case the child shall not be declared to be a ward of the state, unless with the voluntary consent of the other parent, or if one (1) of the two (2) parents has willfully, substantially, and continuously refused for a period of at least one (1) year to give or pay any support, the parental rights of that parent may be terminated immediately by order of the court, in which case the child shall not be declared a ward of the state, unless with the voluntary consent of the other parent.

(5) In the event the infant is made party defendant to the action, the boarding home or foster parent shall not be served with summons notwithstanding provisions of CR 4.04(2).

(6) The court may be convened at any time wherever the judge thereof may be found within the district irrespective of the regular term for the purpose or terminating parental rights under this section, and shall complete the same as soon as possible.

(7) Proceedings under KRS 199.601 to 199.617 may be instituted upon petition by the department, any child-placing agency licensed by the department, any probation officer, any state or local law enforcement officer, any county or Commonwealth's attorney or parent.

(8) In the event a parent who is a defendant in an action for involuntary termination of parental rights is for financial reasons unable to obtain legal representation, the court shall appoint an attorney for such person if de-

fendant requests counsel. The court shall inform the defendant of his right to counsel if possible. The court shall appoint counsel for any defendant under this statute if in the opinion of the court justice will be served. Unless the attorney appointed receives a salary or fee from another source, he shall be paid a reasonable fee for his services which shall be taxed as costs not to exceed three hundred dollars ($300).

(9) In any action for involuntary termination of parental rights, the child to whom the action directly relates shall be made a party defendant to the action and a guardian ad litem shall be appointed to represent his interest.

HISTORY: 1978 H 98, § 10, eff. 6-17-78

APPENDIX U

[3]

Mr. Smith: Well, in the past times when we have appeared here it has been the contention of counsel for the petitioner that this was a hearing for the sole purpose of immediate entitlement. It is our position, and has been from the beginning, that this is a hearing to determine not only that, but, also, the court has the authority to make a decision concerning permanent custody.

The Court: No, I'm not fixing custody. We're here on a motion for possession of immediate entitlement, as

[4]

far as I know.

Ms. Friedman: That's correct, Your Honor.

Mr. Smith: There is a case that holds that the court is also within its province to determine at the same time the question of —

The Court: Well, a certain amount of that overlaps. You can't help but get into both issues; if it is developed that the best interest and welfare of the child would be endangered by granting immediate entitlement, the court would not grant that.

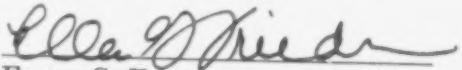
Mr. Smith: Well then, if I understand the court correctly, the only question before the court today is the question of immediate entitlement?

The Court: Principally, that's the main issue here, the question of immediate entitlement.

• • • • •

PROOF OF SERVICE

I, Ellen G. Friedman, the counsel of record for petitioner, having been admitted to practice before the Supreme Court of the United States, do hereby certify that three (3) copies of the Petition for a Writ of Certiorari in the above-styled case were mailed, first class postage prepaid, to Irene P. Long, Counsel for Respondent, Route 2, Bedford, Kentucky 40006; Stephen P. Smith, Jr., Counsel for Respondent, 1526 Kentucky Home Life Building, Louisville, Kentucky 40202; and Charles Dobbins, Jr., Counsel for Baby Boy Van Wey, 600 West Main Street, Louisville, Kentucky 40202, on the 6 day of January, 1984. I further certify that to my knowledge all parties required to be served have been served.



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Office · Supreme Court, U.S.
FILED
FEB 6 1984
ALEXANDER L. STEVAS
CLERK

No. 83-1123

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1983

CHRISTINE VAN WEY, - - - - Petitioner

versus

RAYMOND F. O'NEAL
DONNA O'NEAL and
BABY BOY VAN WEY, - - - - Respondents

BRIEF FOR THE RESPONDENTS, RAYMOND F. O'NEAL AND DONNA O'NEAL, IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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February 2, 1984

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1983

No. 81-1123

CHRISTINE VAN WEY, - - - - *Petitioner*

v.

RAYMOND F. O'NEAL
DONNA O'NEAL and
BABY BOY VAN WEY, - - - *Respondents*

BRIEF FOR THE RESPONDENTS, RAYMOND F. O'NEAL AND DONNA O'NEAL, IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

COUNTERSTATEMENT OF THE CASE

Petitioner (Christine Van Wey) contacted a Louisville attorney, one Katie Brophy, in November, 1980, seeking placement for adoption of her unborn child. (Mrs. Van Wey was married, but separated from her husband and the child was that of another man.) The Respondents O'Neal agreed to adopt the baby after its birth. Petitioner in conformity with her wish to "adopt out" her child came to Louisville where she lived for two months awaiting birth of her child. During this period she complied with all state agency procedures preliminary to adoption and once hospitalized for his birth, she executed all necessary releases so that the adoption might go forward. Shortly after the birth of her child on January 22, 1981, he was, with the approval of the Petitioner, delivered to the home of the

O'Neals (Respondents) where he has resided since that date.[1]

After the child was removed from the hospital, and for a part of a day only, Petitioner apparently had a change of mind about the adoption but by that same night she again wanted to proceed with the termination and telephoned her attorney to insist on going ahead with the voluntary termination proceeding the next day. The next day she came before the trial judge and at a hearing on her verified Petition for Voluntary Termination of her Parental Rights (App. A, pp. 1a-4a) demanded that her parental rights be terminated, advising the trial judge that she was fully aware of her action in the termination proceeding. No order was entered since the husband was a necessary party and had to be brought before the Court on constructive service. Petitioner then returned to Iowa.

Not until three months thereafter did Petitioner institute any legal proceedings to retrieve her child from Respondents O'Neal when she filed a Petition for Immediate Entitlement in the Voluntary Termination proceeding which was still pending. (App. B, pp. 5a-7a). Some two months later, after such filing, an evidentiary hearing was had on the second Petition.[2]

---

[1]The child was adopted by Respondents O'Neal in October, 1981, in the appropriate Kentucky forum, the Trimble County Circuit Court. This action has never been questioned.

[2]While the Trial Court initially announced that the matter was for immediate entitlement only, Kentucky law provides, inter alia, that the Court may determine permanent custody in such a proceeding. *Galloway* v. *Pruitt*, Ky., 469 S. W. 2d 556 (1971); *Moore* v. *Dawson*, Ky., 531 S. W. 2d 259 (1975).

At the conclusion of the evidentiary hearing, the Court took the Petition for Immediate Entitlement under submission. Several days thereafter, on June 22, 1981, the Trial Judge entered an Order that Petitioner had taken all the necessary steps to complete the termination of her parental rights and such steps were not the result of threats or duress and her Petition for Immediate Entitlement was denied. (Petition for Certiorari, Appendix N, pages 41a-51a). On July 8, 1981, all parties then being before the Court, the Trial Court entered a Supplemental Order Terminating the Parental Rights on Petitioner's Voluntary Petition pursuant to Kentucky Revised Statutes 199.611 (App. C, p. 8a) and awarded permanent custody to the Respondents O'Neal.

ARGUMENT

I. CERTIORARI SHOULD BE DENIED AS THE SUPREME COURT DOES NOT HAVE JURISDICTION OF THIS CASE.

A. No Federal Questions Were Properly Raised or Considered in the State Courts.

The Petitioner has attempted to invoke jurisdiction under Title 28 U.S.C. Sect. 1257(3). This Court may not take jurisdiction on the ground that the Kentucky Supreme Court did not pass on any federal question and that such question was not in fact raised.

> "It is essential to the jurisdiction of this Court in reviewing a decision of a court of a State that it must appear affirmatively from the record, not only that a federal question *was presented for decision* to the highest court of the state having

> jurisdiction but that its decision of the federal question was necessary to the determination of the cause and that *it was actually decided* or that the judgment so rendered could not have been given without dealing with it." (cites omitted) *Lynch* v. *N. Y., ex rel. Pierson,* 293 U. S. 54, 55, 79 L. Ed. 192, 193 (1934). (Emphasis added)

Title 28 U.S.C. Sect. 1257 (28 U.S.C.S. Sect. 1257) provides in pertinent part as follows:

> "Final judgments or decrees rendered by the *highest court* of a State in which a decision could be had may be reviewed by the Supreme Court as follows:
>
> (3) By writ of certiorari . . . where any title, right, privilege or immunity is *specially set up or claimed under the Constitution;* treaties or statutes of, or commission held or authority exercised under, the United States." (Emphasis added).

As applied to this case that statute requires that in the state courts the Petitioner shall have "specially set up or claimed under the Constitution of the United States". Similarly, the Supreme Court Rule 21.1(h) puts the following burden on Petitioner, namely, to:

> ". . . specify the stage in the proceedings, both in the court of first instance and in the appellate court, at which the federal questions sought to be reviewed were raised; the method or manner of raising them and the way in which they were passed upon by the court; . . . (e.g., ruling on exception, portion of court's charge and exception thereto, assignment of errors) as will show that

> the federal question was timely and properly raised so as to give this Court jurisdiction to review the judgment on writ of certiorari."

An examination of the portions of the record or summaries set out in the Petition and this Brief in Opposition will show that:

1. No federal question was ever properly raised either in the court of first instance or in the appellate courts, and;

2. No court, either in the court of first instance, or the appellate courts, ever considered or passed upon a federal question in this case.

We would point out that nowhere in the opinion of the Kentucky Supreme Court is any federal question mentioned, let alone expressly passed upon. (App. A, pp. 1a-13a, Petition for Certiorari) Nor is any federal issue mentioned in the dissenting opinion of that Court. The herein Court has frequently stated that when "the highest state court has failed to pass upon a federal question, it will be assumed that the omission was due to want of proper presentation in the state courts unless the aggrieved party in this Court *can affirmatively show the contrary*". *Street* v. *N. Y.*, 394 U. S. 576, 582, 22 L. Ed. 2d 572, 89 S. Ct. 1354 (1969) quoted in *Webb* v. *Webb*, 451 U. S. 493, 68 L. Ed. 2d 392, 101 S. Ct. 1889 (1981). (Emphasis added).

Although Petitioner has cited certain portions of the record in support of her claim that she raised a federal issue, an examination of these references will

show conclusively that Petitioner indeed failed to properly raise or to preserve any constitutional claim.

1. PETITIONER DID NOT PROPERLY RAISE ANY CONSTITUTIONAL QUESTION IN THE TRIAL COURT.

In order to give this Court jurisdiction, it must have been specially set up or claimed at a *proper time and in the proper way.*

> "If it was not claimed in the trial court and therefore by the law and practice of the State, as declared by its highest court, could not be considered by that court; . . . it cannot be asserted in this Court." *Morrison* v. *Watson,* 38 L. Ed. 927 (1894)

Petitioner seeks to invoke the jurisdiction of this Court by language set out from a response to a motion filed in the trial court, to-wit: "Due process mandates a full hearing on the merits before parental rights can be involuntarily terminated" (Petition for Certiorari at page 4). That is the *sole trial court* reference relied on by Petitioner. It does not constitute "specially set up at a proper time and in the proper way". Respondent has set out the entire portion of the record from which the cited phrases were lifted (App. D, pp. 9a-11a). Same shows conclusively that Petitioner was not making any claim to federal protection in the trial court, but that she was relying on the Kentucky statutes to-wit: KRS 199.603. She stated that the trial court should apply one Kentucky statute (KRS 199.603) rather than another (KRS 199.601) (App. T, Petition). The relief demanded by Petitioner was,

"Mrs. Van Wey is absolutely entitled to a hearing pursuant to KRS 199.603." (App. D, p. 11a)[3]

To paraphrase the court in *Webb* v. *Webb, supra,* at page 396, although the Petitioner did use the phrase "due process" at one point in the trial court proceedings, nowhere in that court did she cite to the federal constitution or to any cases relying on the due process clause of the federal constitution. Mere reference to "due process of law" or "Constitution of the United States" is not sufficient to comply with Title 28 U.S.C. 1257(3). *Bowe* v. *Scott,* 233 U. S. 658, 664-665, 34 S. Ct. 49; *Brady* v. *Maryland* 373 U. S. 83, 91; 83 S. Ct. 1194 (1914).

From the portion of the record in the trial court presented to this Court by Petitioner, it is clear that Petitioner was relying on Kentucky statutory remedies. She did not raise any federal question; she did not seek a ruling on a federal question; she did not preserve any claim of error on a constitutional issue in the trial court. Since no constitutional issue was raised in the trial court, that court did not rule on any federal question.

2. PETITIONER DID NOT PROPERLY RAISE ANY CONSTITUTIONAL QUESTION IN THE STATE APPELLATE COURTS.

The question of whether a constitutional issue has been raised in "due time" in the state courts is gen-

[3]Note that Mrs. Van Wey received two (2) hearings in the trial court; one on her Petition for Voluntary Termination held on January 27, 1981; one on her Petition for Immediate Entitlement held on June 17, 1981.

erally left to state procedure. (*Louisville & Nashville R. Co.* v. *Woodford,* 234 U. S. 46, 51, 58 L. Ed. 1202, 34 S. Ct. 739 (1914).)

Not having been claimed in the trial court, by the law and practice in Kentucky as declared by its highest court, such constitutional issue could not be considered by that highest court. In Kentucky, an appeal is limited to claimed errors arising in the trial court and matters not raised in the trial court are not before the appellate tribunals. (Sects. 110-111, Ky. Constitution; *Stice* v. *Leonard,* Ky., 420 S. W. 2d 672, 674 (1967).

> "Since this is an appellate court, our function is to review possible errors made by the trial court. If such court has had no opportunity to rule on a question, there is no alleged error before us to review." *Commonwealth, Dept. of Highways* v. *Williams,* Ky., 317 S. W. 2d 483, 484 (1958).

Thus, no constitutional issue was properly before the Kentucky Court of Appeals or the Kentucky Supreme Court, a federal question having been neither raised nor ruled on in the trial court.

Additionally, Petitioner did not assign as error any constitutional grounds nor rely on any constitutional issues in arguments addressed to the appellate courts. In deciding if a question was specially set up or claimed under the meaning of 28 U.S.C. 1257(3), "It is relevant and usually sufficient to ask whether Petitioner satisfied the state rules governing presentation of issues". (*Amalgamated Food Emp. Union*

v. *Logan Valley Plaza,* dissent of Justice Harlan, 391 U. S. 308, 334, 88 S. Ct. 1601) (citations omitted). In Kentucky practice the Rules of Civil Procedure, namely, Rule 76.12(4)(c)(ii) require that a brief of appellant contain the following:

> "A 'Statement of Points and Authorities' which *shall set forth,* succinctly and in the order in which they are discussed in the body of the argument, the appellant's contentions with respect to *each issue of law on which he relies for a reversal, . . .*" (Emphasis added) (similar requirement, Appellee, CR 76.12(4)(d)(i).)

Respondent has set out in full the Statement of Points, i.e., the issues of law on which the Petitioner relied in the state appellate courts (App. E-J, pp. 12a-17a). Petitioner did not set out any constitutional issue therein. Despite her statement in the herein Petition, it is clear that Petitioner did not present any Fourteenth Amendment grounds for reversal of the trial court. All told, Petitioner presented six separate sets of issues on appeal in the state courts (App. E-J, pp. 12a-17a), i.e., she had six opportunities to bring a constitutional claim to the attention of the court if she was relying on such claim. Not once did Petitioner frame a constitutional issue for consideration by the appellate court. She did not raise a single federal question at any time. All issues presented are addressed to Kentucky state law. If Petitioner intended to rely on such grounds, she failed to apprise the Court of her intentions!

Petitioner has copied into her Petition herein a paragraph taken from her briefs before the Kentucky Court of Appeals and the Kentucky Supreme Court (Petition for Certiorari, pp. 5-6). Both paragraphs are merely general statements of legal principles. Neither purports to be an issue presented to the Appellate Court for a ruling thereon. This does not constitute "specially set up or claimed" within the meaning of 28 U.S.C. Sect. 1257(3). The Kentucky Supreme Court obviously did not believe that any federal issue was presented to it. It is completely silent on any federal question.

The "specially set up or claimed" limitation under 28 U.S.C. 1257(3) is imposed by Congress on this Court's authority to review judgments of state courts. It is a *jurisdictional limitation. Cardinale* v. *Louisiana,* 394 U. S. 437, 438, 22 L. Ed. 2d 398, 89 S. Ct. 1161 (1969).

It is a long settled rule of this Supreme Court that the jurisdiction of this Court to re-examine the final judgment of a state court can arise only if the record as a whole shows either expressly or by clear implication that the federal claim was adequately presented in the state system (*Webb* v. *Webb, supra*). *People of N.Y., ex rel Bryant* v. *Zimmerman,* 78 L. Ed. 184, 278 U. S. 63, 49 S. Ct. 61 (1928). The jurisdiction of this Court to reexamine the final judgment of the State Court can only arise from averments so distinct and positive so as to place it beyond question that the party bringing a case before this Court from a state court intended to assert a federal right. (*Oxley Stave*

Co. v. *Butler County,* 166 U. S. 648, 655, 41 L. Ed. 1149, 17 S. Ct. 709 (1897). We further submit that Petitioner must show that her grounds for a federal claim were brought to the attention of the state court with *fair precision* and *in due time. People of N.Y. ex rel. Bryant* v. *Zimmerman, supra.* Barring this, her claim has not been adequately presented.

It cannot be said that the record cited to this Court affirmatively discloses that any federal question was raised or considered by the Kentucky Supreme Court. That being so, certiorari should be denied.

3. THE "NOT PRESSED OR PASSED UPON" RULE MANDATES THAT THIS COURT IS WITHOUT JURISDICTION IN THIS CASE

The trial court herein did not address any constitutional issue (App. N, O, Petition for Certiorari). The Kentucky Court of Appeals did not address any constituional issue (App. R, Petition for Certiorari). The Supreme Court of Kentucky did not address any constitutional issue (App. A, B, Petition for Certiorari).

It should be abundantly clear that such omission was not an *oversight* but rather that no federal issue was ever properly brought before any of these courts, and that certiorari must then be denied.

This court has very recently reaffirmed the practee of this Court in the "not pressed nor passed upon" rule with a discussion in *Illinois* v. *Gates,* 103 S. Ct. 2317, 2321, 2323 (1983). Justice Rehnquist in the

opinion quotes from a number of cases holding this said rule to be jurisdictional, to-wit: unless a federal question had been *both raised and decided* in the state court, the appellate jurisdiction fails (*Crowell* v. *Randall,* 10 Pet. 368, 391, 9 L. Ed. 458 (1836). *McGoldrich* v. *Compagnie General,* 309 U. S. 430, 435-436, 60 S. Ct. 670, 673, 84 L. Ed. 849 (1940) states as follows:

> "But it is also the settled practice of this Court, in the exercise of its appellate jurisdiction, that it is only in exceptional cases, and then only in cases coming from the Federal courts, that it considers questions urged by a petitioner or appellant *not pressed or passed upon in the courts below.*" (cites omitted) (Emphasis added)

"Since the (state) Supreme Court did not pass on the question, we may not do so." *State Farm Mutual Automobile Insurance Company* v. *Duel,* 324 U. S. 154, 160, 56 S. Ct. 573, 576, 89 L. Ed. 812 (1945). The court in *Gates* identifies the several purposes underlying the "not pressed or passed upon" rule which have been expressed in prior decisions in refusing to hear federal claims not raised in state courts (*Cardinale* v. *Louisiana, McGoldrich* v. *Compagnie General, supra*) which rationale provides sound justification in the herein case for denial of jurisdiction.

The federal question set out herein by Petitioner for consideration by this Court having never been raised, preserved or passed upon in the state courts below, jurisdiction must be denied.

4. PETITIONER MAY NOT ASSAIL A STATE STATUTE AS UNCONSTITUTIONAL WHERE STATUTE WAS NOT ATTACKED IN STATE COURTS.

Although not directly posed as such, Question II presented by Petitioner puts in issue the constitutionality of Kentucky's statute on *voluntary* termination (KRS 199.601) (Petition for Certiorari, face page i). In asking the question whether the federal right to family privacy and integrity precludes termination of parental rights based upon best interests of the child without a showing of parental unfitness, Petitioner in effect attacks the Kentucky statute as repugnant to the Constitution. Petitioner does not confine her said question to whether her rights may be subject to involuntary termination under such conditions but rather uses the inclusive language "termination of parental rights". Kentucky's statute on voluntary termination cited in Appendix T, Petition for Writ of Certiorari page 71a, 72a, allows for termination of a parent's rights to his child on petition *filed by the parent wherein* "best interest of the child shall be considered paramount". The voluntary termination statute does not require any finding of fitness for a *voluntary* termination.

As in *Morrison* v. *Watson,* 38 L. Ed. 927, 928, 154 U. S. 111 (1894) the difficulty is that it does not appear that any objection to the constitutionality of the statute was taken by Petitioner in courts of the state. On the contrary, she seemed to have assumed that the statute was constitutional and valid. There was no question as to validity of either termination statute. The ques-

tion was whether the court properly proceeded under the voluntary rather than the involuntary termination statute. Such is not the question posed in Petitioner's Question II which in effect assails the constitutionality of Kentucky's termination procedure.

This Court is clearly without jurisdiction to consider the issue raised as Petitioner's Question II. It has been a long standing policy of this Court in cases coming to the Supreme Court from the state courts wherein a statute is assailed as unconstitutional, that there are compelling reasons why this Court should *not* decide questions not presented nor decided by the highest court.

> "Apart from the reluctance with which every court should proceed to set aside *legislation as unconstitutional on grounds not properly presented,* due regard for the appropriate relationship of this Court to state courts *requires* us to decline to consider and decide questions affecting the validity of state statutes not urged or considered there. *(McGoldrich* v. *Campagnie General, supra)*

We would also note that Petitioner has not used correct procedures to question the said statute before this Court (U. S. Supreme Court Rule 28).

Petitioner has attempted to do herein by indirection what she may not do directly. The question of the validity of the statute having never been before the state court, the attack in this Court comes too late.

B. The United States Supreme Court Is Without Jurisdiction to Review a State Court Decision Based Upon Adequate and Independent Non-federal or State Ground.

We have already shown that no federal question was properly raised or presented or decided by any of the Kentucky Courts. We now turn our attention to the jurisdiction of the Federal Supreme Court to review State Court decisions where no federal question is involved.

No decision of any federal question was necessary to the determination of the cause; the judgment as rendered, not only could have been, but was given without deciding any federal question.

Despite Petitioner's allegations herein of a federal issue, her cause in the Kentucky Courts was based solely on state grounds. We refer particularly to Kentucky Revised Statute 199.601 and 199.603, the Kentucky statutes on voluntary and involuntary termination of parental rights. The questions presented for argument in the appellate courts of Kentucky were basically:

> (1) Whether the court correctly held that there was no duress when Petitioner consented to the termination of her parental rights.
>
> (2) Whether the Petitioner made, or could make, a timely revocation of her voluntary termination of her parental rights.

The Kentucky Supreme Court obviously understood this case to concern the application of Kentucky law to a question of whether or not she had an *absolute*

right to withdraw her consent to the voluntary termination of her parental rights. The Kentucky Courts have held in a long line of Kentucky cases beginning with *Lee* v. *Thomas,* 297 Ky. 858, 191 S. W. 2d 457 that having voluntarily relinquished custody of her child to others for adoption that Petitioner had no *absolute* right to regain her child. This principle of law has been affirmed time and again by the Kentucky Courts. It places the burden on the one who chooses of his own free will to give up his child that he must prove that the child's best interest would be served by a return of his custody.

Petitioner agreed that she must show sufficient cause to withdraw a consent; however, the Kentucky Supreme Court failed to find sufficient cause herein, stating:

> "When Ms. Van Wey filed her Petition for *Voluntary Termination,* she invoked the jurisdiction of the Court of Justice to look after the welfare of this human being" (the infant child). (Petitioner's Appendix A, Petition for Certiorari, pages 1a-13a, at 13a) (Emphasis added)

That court then proceeded under the voluntary termination statute contrary to Petitioner's claim that the Court must apply the involuntary termination statute. All issues were questions of state law. No federal question was involved.

Since it has clearly been shown that the state court decision was based upon a non-federal ground, it only becomes necessary to discover whether that ground is

adequate to support the judgment without consideration of the federal question which was never properly brought before any of the courts of Kentucky.

The Federal Supreme Court has consistently adhered to the self-imposed principle that it will not review a State Court judgment based upon an adequate and independent state ground. *Murdock* v. *Memphis,* 20 Wall. 590, 636; *Berea College* v. *Kentucky,* 211 U. S. 53; *Fox Film Corp.* v. *Muller,* 296 U. S. 207.

In the case of *Zacchini* v. *Scripts-Howard Broadcasting Co.,* 53 L. Ed. 2d 965, 970 *et seq.,* the Supreme Court said:

> "If the judgment below rested on an independent and adequate state ground, the writ of certiorari should be dismissed as improvidently granted, *Wilson* v. *Loew's Inc.,* 355 U. S. 597, 2 L. Ed. 2d 519, 78 S. Ct. 526 (1958) for '(o)ur only power over state judgments is to correct them to the extent that they incorrectly adjudge federal rights. And our power is to correct wrong judgments, not to revise opinions. We are not permitted to render an advisory opinion, and if the same judgment would be rendered by the State Court after we corrected its views on federal laws, our review could amount to nothing more than an advisory opinion.'" *Herb* v. *Pitcairn,* 324 U. S. 117, 125-126, 89 L. Ed. 789, 65 S. Ct. 459 (1945).

Since we have shown that there is no federal constitutional issue properly before this Court it only remains to determine if the non-federal ground is broad enough to sustain the state judgment, is inde-

pendent of any federal question and the grounds used are tenable ones. *Abie State Bank* v. *Bryan,* 282 U. S. 765, 773; *Staub* v. *Baxley,* 355 U. S. 313, 318-319; *N.A.A.C.P.* v. *Alabama,* 357 U. S. 449, 455.

Petitioner cites in her petition Kentucky Revised Statute 199.601 and Kentucky Revised Statute 199.603 (Petitioner's Appendix T, pages 71a-76a). From its very inception in the Trial Court this action has *only* involved the construction of these statutes as applied to the facts of this case. It was never in the contemplation of any of the parties or the courts that there was any other issue other than those rights grounded in state law subject to the application of the Kentucky Revised Statutes 199.601 and 199.603.

Thus we find that the non-federal ground (the construction and application of these State Statutes) is broad enough to sustain the State Judgment, *Murdock* v. *Memphis,* 20 Wall. 590, 636; *Eustis* v. *Bolles,* 150 U. S. 361, 370; that it is independent of any federal question (none was raised or preserved below as has been previously shown); and, the non-federal ground is a tenable one (the reasoning of the Kentucky Supreme Court is clear and unambiguous as to its basis of its decision). There is no indication that the Kentucky Supreme Court decision is "so certainly unfounded that it properly may be regarded as essentially arbitrary, or a mere device to prevent a review of the decision upon the federal question". *Enterprise Irrigation District* v. *Farmers Mutual Canal Co.,* 243 U. S. 157, 164; *Ward* v. *Love County,* 253 U. S. 17, 22;

Postal Tele. Cable Co. v. *Newport,* 247 U. S. 464, 475-476; *Lawrence* v. *State Tax Commission,* 286 U. S. 276, 282.

These inquiries all being answered in the affirmative the Supreme Court should decline jurisdiction.

II. THE KENTUCKY SUPREME COURT DECISION IS A LEGITIMATE CONSTRUCTION AND APPLICATION OF STATE STATUTES REGARDING VOLUNTARY AND INVOLUNTARY TERMINATION OF PARENTAL RIGHTS.

It must be remembered that this action was brought as a voluntary termination by the natural mother under KRS 199.601 (Petitioner's Appendix T, pages 71a-73a). There the procedure for and the right of a parent to terminate his parental rights is set up. *This is an action which can be brought only by a parent* and even so there are safeguards established to protect the Due Process rights of the parent.

The cases cited by the Petitioner are those that have involved the involuntary termination of parental rights. The case of *Santosky* v. *Kramer,* 455 U. S. 245, 102 S. Ct. 1388 (1982) was an action brought by the State of New York to involuntarily terminate the rights of the parents. This court struck down the State Statute as the stated standard of proof was not high enough. In that case the constitutionality of the statute was challenged at every step in the State Court proceedings. Such was not the case in the action now pending before this Court.

The case of *Lassister* v. *Dept. of Social Services of Durham, North Carolina,* 452 U. S. 18, 101 S. Ct. 1253 (1981) was again an involuntary termination action brought by an agency of the State of North Carolina and appealed on the ground that counsel had not been appointed for the indigent mother. The Supreme Court found that her Due Process rights had not been violated and affirmed the State Court judgment terminating her parental rights. Chief Justice Burger, in his concurring opinion, said:

> "The purpose of the (involuntary) termination proceedings at issue here was not punitive; on the contrary, its purpose was *protective* of the child's best interest. * * * (T)he writ might well have been a 'candidate' for dismissal as improvidently granted." ( ) inserted.

The only discussion of *Matthew* v. *Eldridge,* 424 U. S. 319, 96 S. Ct. 893 (1976) came in the deciding whether the mother was entitled to appointed counsel to represent her.

None of the other Supreme Court cases cited by Petitioner have any relationship to termination proceedings.

The decision of the Kentucky Supreme Court was based solely upon the application of the Kentucky Termination Statutes to the facts presented in the Trial Court. The Kentucky Court found that the provisions of the voluntary termination statute had been met by the evidence.

III. THE USE OF A "BEST INTEREST" STANDARD TO TERMINATE PARENTAL RIGHTS IN A VOLUNTARY TERMINATION PROCEEDING DOES NOT REQUIRE A FINDING OF UNFITNESS.

The Supreme Court of Kentucky correctly applied the State law relative to voluntary terminations. KRS 199.601. This Kentucky Statute provides, in part, that

> 7. The best interest of the child shall be considered paramount.

Under this statute it is not necessary to find unfitness on the part of a parent who voluntarily terminates his parental rights.

It cannot be said that the decision of the trial court was not reached after the Petitioner had been afforded a full hearing and the opportunity to offer evidence on any matter she thought relevant, and the Petitioner's substantive rights were not violated by a "best interest of the child" standard.

This is not a case in which the child would be placed with a new set of parents with whom the child had never before lived but is a case that gives full recognition to a family unit that has been in existence since the birth of the child (some three years ago), a result desired by all concerned, except Petitioner. Thus it is clearly evident that the decision of the Kentucky Supreme Court was not based on the "best interest of the child" standard alone. *Quillion* v. *Walcott*, 434 U. S. 246, 98 S. Ct. 549 (1978). In both of the Kentucky termination statutes the "best interest of the child' is only one of the factors to be considered. All

relevant factors were considered by the Kentucky Supreme Court and it cannot be said that its decision was based on the "best interest of the child" alone.

CONCLUSION

For all the reasons hereinabove recited, it is clear that the United States Supreme Court does not have jurisdiction of the herein case and the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

IRENE P. LONG
Route #2
Bedford, Kentucky 40006
Telephone: (502) 255-4444

STEPHEN P. SMITH, JR.
2615 Taylorsville Road
Louisville, Kentucky 40205
Telephone: (502) 451-3713

Counsel for Respondents O'Neal

PROOF OF SERVICE

I, Irene P. Long, the counsel of record for Respondents having been admitted to practice before the Supreme Court of the United States, do hereby certify that three (3) copies of the Brief in Opposition in the above-styled case were mailed, first class postage prepaid, to Ellen G. Friedman, Counsel for Petitioner, Legal Aid Society, Inc., 425 West Muhammad Ali Blvd., Louisville, Kentucky 40202; Robert Frederick Smith, Counsel for Petitioner, Legal Aid Society, Inc., 425 West Muhammad Ali Blvd., Louisville, Kentucky 40202; and Charles Dobbins, Jr., Counsel for Baby Boy Van Wey, 600 West Main Street, Louisville, Kentucky 40202, all on the 2nd day of February, 1984. I further certify that to my knowledge all parties required to be served have been served.

Irene P. Long

IRENE P. LONG
Counsel for Respondents
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Bedford, Kentucky 40006
Telephone: (502) 255-4444

APPENDIX

APPENDIX A

JEFFERSON CIRCUIT COURT

SIXTH DIVISION

No. 81-AD-0037-T

CHRISTINE VAN WEY - - - - - - *Petitioner*

v.

STANLEY VAN WEY
WARNING ORDER AND MILITARY ATTORNEY
TO BE APPOINTED
BABY BOY VAN WEY, an infant under
14 years of age
GUARDIAN AD LITEM TO BE APPOINTED
(Serve: Guardian ad Litem) - - *Defendants*

PETITION FOR VOLUNTARY TERMINATION OF PARENTAL RIGHTS PETITION FOR INVOLUNTARY TERMINATION OF PARENTAL RIGHTS AND AFFIDAVIT FOR APPOINTMENT OF WARNING ORDER AND MILITARY ATTORNEY

1. The Petitioner, CHRISTINE VAN WEY, states that she is the natural mother of a child, BABY BOY VAN WEY, born January 22, 1981.

2. The Petitioner, CHRISTINE VAN WEY, states that she is willing to relinquish all of her parental rights in and to the child, BABY BOY VAN WEY, to the couple approved by the Department for Human Resources.

3. The Petitioner, CHRISTINE VAN WEY, is authorized under KRS 199.601 to institute this action.

4. The Petitioner, CHRISTINE VAN WEY, states that the infant Defendant, BABY BOY VAN WEY, was born January 22, 1981, in Louisville, Jefferson County, Kentucky.

5. The Petitioner, CHRISTINE VAN WEY, states that she was married at the time of the birth of the infant Defendant to Stanley Van Wey. Petitioner states that Stanley Van Wey is not the natural father of the infant Defendant and that the natural father of the infant Defendant is unknown. However, due to the marital relationship Stanley Van Wey is made a party to this action so that any parental rights he may have to the infant Defendant may be terminated.

6. The Petitioner, CHRISTINE VAN WEY, states that the Defendant Stanley Van Wey has never acknowledged the infant Defendant and therefore has abandoned and deserted same.

7. The Petitioner, CHRISTINE VAN WEY, states that it will be in the best interest of the infant Defendant, BABY BOY VAN WEY, to have the parental rights of the Defendant, Stanley Van Wey, terminated, and to have the care, custody and control of the infant Defendant, BABY BOY VAN WEY, placed in the home approved by the Department for Human Resources.

8. The Petitioner, CHRISTINE VAN WEY, states that the couple approved by the Department for Human Resouces, Commonwealth of Kentucky, has adequate facilities available and is willing to accept the care, custody and control of the infant Defendant, BABY BOY VAN WEY.

9. The Petitioner, CHRISTINE VAN WEY, states that the infant Defendant, BABY BOY VAN WEY, has no guardian, curator or committee appointed for him in this state or elsewhere.

10. The Petitioner, CHRISTINE VAN WEY, states that the Defendant Stanley Van Wey, is a nonresident of Kentucky and is known to be absent therefrom and his last known address is 128 Sheridan, Muscatine, Iowa 52761.

WHEREFORE: The Petitioner, CHRISTINE VAN WEY, prays:

1. That a guardian ad litem be appointed to accept service of summons for the infant Defendant, BABY BOY VAN WEY, and to represent him when he is properly before the Court.

2. That a Warning Order and Military Attorney be appointed to attempt to locate the Defendant, Stanley Van Wey, for the purpose of informing him of the nature and pendency of this action;

3. For a judgment terminating the parental rights of CHRISTINE VAN WEY to the infant Defendant, BABY BOY VAN WEY.

4. For a judgment terminating all of the parental rights of the Defendant, Stanley Van Wey, to the infant Defendant, BABY BOY VAN WEY, and that the care, custody and control of the said infant be granted to and vested in the couple approved by the Department for Human Resources, Commonwealth of Kentucky.

5. For any and all other relief to which the Petitioner, and the infant Defendant, BABY BOY VAN WEY, may appear entitled.

(s) Christine Van Wey
Christine Van Wey

I, CHRISTINE VAN WEY, hereby certify that I have read the foregoing petition and that all allegations contained therein are true to the best of my knowledge and belief.

(s) Christine Van Wey
Christine Van Wey

(s) Katie M. Brophy
Katie M. Brophy
Attorney at Law
Suite 200
123 South Seventh Street
Louisville, Kentucky 40202
Phone: (502) 583-1711

I, the undersigned Clerk of Jefferson Circuit Court do certify that the foregoing Petition for Voluntary Termination of Parental Rights, Petition for Involuntary Termination of Parental Rights and Affidavit for Appointment of Warning Order and Military Attorney was this day acknowledged before me in said State and County and was delivered, sworn, acknowledged and signed by the Petitioner, CHRISTINE VAN WEY, to be her free and voluntary act and deed for the purposes therein contained.

Paulie Miller, Clerk
Jefferson Circuit Court

By: Marfa Jones
Deputy Clerk

Jan. 27, 1981
Date

APPENDIX B

JEFFERSON CIRCUIT COURT

SIXTH DIVISION

No. 81-AD-0037-T

CHRISTINE VAN WEY - - - - - - *Petitioner*
503 Park Avenue
Muscatine, Iowa 52761

v.

STANLEY VAN WEY,
BABY BOY VAN WEY - - - - - - *Defendants*

PETITION FOR IMMEDIATE ENTITLEMENT POSSESSION AND CUSTODY—Filed April 30, 1981

Comes the Petitioner, Christine Van Wey, by counsel, and for her petition for immediate entitlement, possession and custody states as follows:

1. Petitioner is the natural mother of infant child Baby Boy Van Wey, born on January 22, 1981.

2. Petitioner was legally married to Respondent, Stanley Van Wey, at the date of birth of said child.

3. John W. Adler is the natural father of said infant child.

4. The Court record of the above-styled case contains no order terminating the rights of any of the persons named in paragraphs one, two and three above.

5. On January 27, 1981, Petitioner signed a petition to voluntarily terminate her parental rights to said infant child.

6. That petition was signed under extreme duress at a time when Petitioner was emotially upset, physically weakened, and financially destitute, miles from her home; Petitioner was also in fear for the well-being of her other two children. (See Petitioner's Affidavit attached herein as Exhibit 1.)

7. Due to severe financial hardship and emotional strain, before the baby was born, Petitioner hired Katie Marie Brophie, attorney at law, to represent her in terminating her parental rights.

8. Immediately after Ms. Brophie removed the baby from the hospital, Petitioner realized she did not want to give up her child.

9. Petitioner attempted to get the baby back by contacting the Department for Human Resources, the Louisville Bar Association, and the Legal Aid Society, Inc., for help.

10. Petitioner told Ms. Brophie that she no longer wished to terminate her rights, and that she had a new attorney to represent her, but nevertheless, Ms. Brophie coerced Petitioner to sign the voluntary termination papers. (See Exhibit 1, paragraph 3.)

11. Petitioner would not have signed the petition for voluntary termination but for undue pressure placed upon her at a time when she was emotionally upset, physically weakened, and financially destitute, miles from her home.

12. Petitioner is presently physically, emotionally and financially able to care for her baby, and she is the fit and proper person to have possession and custody of said child.

13. Although Petitioner did not freely give consent to terminate her parental rights, she hereby revokes said "consent", such as it was.

WHEREFORE, Petitioner prays this Court grant her immediate entitlement, possession and custody of infant child, Baby Boy Van Wey.

Tendered By:

(s) Ellen G. Friedman
Ellen G. Friedman
Attorney for Petitioner

(s) Robert Frederick Smith
Robert Frederick Smith
Attorney for Petitioner
Legal Aid Society, Inc.
425 West Muhammad Ali Blvd.
Louisville, Kentucky 40202
Telephone: (502) 584-1254

CERTIFICATE

I hereby certify that a copy of the foregoing Petition was on the 29th day of April, 1981, mailed to Mr. Charles Dobbins, Attorney at Law, 2310 First National Tower, Louisville, Kentucky 40202, and Mr. and Mrs. Raymond O'Neal (a/k/a Donna & Frank O'Neal), Route #2, Bedford, Kentucky 40006.

(s) Ellen G. Friedman
Ellen G. Friedman
Attorney at Law

APPENDIX C

KENTUCKY REVISED STATUTES

199.611. Order of termination. [Repealed effective July 15, 1984.]—(1) If the court determines that all parties with parental rights to the child under the law have either petitioned the court to have their parental rights terminated voluntarily or have had their rights terminated involuntarily by an order entered by a court of competent jurisdiction, and that the termination of parental rights and their transfer are in the best interest of the child, and that each petitioner is fully aware of the purpose of the proceedings and the consequences of KRS 199.601 to 199.617, it shall make an order terminating all parental rights and obligations in the parent in whom they have existed, and releasing the child from all legal obligations to his parents, and transferring such parental rights to some other person or authorized agency or department as may, in the opinion of the court, be best qualified to receive them, except that the child shall retain the right to inherit from its parents under the laws of descent and distribution until the child is adopted. Such order may contain the power for the cabinet, or authorized agency to consent to the adoption of such child.

(2) Any order entered under KRS 199.601 to 199.617 shall be conclusive and binding on all parties and no appeal may be taken from a judgment of voluntary termination. (Enact. Acts 1978, ch. 137, § 9, effective June 17, 1978.)

Compiler's Notes. This section was repealed by § 152 of Acts 1980, ch. 280, effective July 1, 1982; however § 1 of Acts 1982, ch. 284 amended § 153 of Acts 1980, ch. 280 changing the effective date of such act to July 15, 1984. Therefore, the repeal of this section is effective July 15, 1984.

APPENDIX D

JEFFERSON CIRCUIT COURT

SIXTH DIVISION

No. 81-AD-0037-T

CHRISTINE VAN WEY - - - - - *Petitioner*

v.

STANLEY VAN WEY, ET AL. - - - *Defendants*

PETITIONER'S RESPONSE TO DEFENDANTS' MOTION TO TERMINATE HER RIGHTS

I. Defendants, Frank and Donna O'Neal, Have No Standing to Move for Termination of Petitioner's Parental Rights.

The Kentucky legislature specifically provided a list of those who have standing to bring such an action. They are "the department, any child-placing agency licensed by the department, any probation officer, any state or local law enforcement officer, any county or commonwealth's attorney or parent." KRS 199.603(7). Clearly, the O'Neals do not fall within any of these specified categories, and the law does not permit anyone else to act.

In *Smith* v. *Wilson*, Ky., 269 S. W. 2d 255 (1954), the Court of Appeals held that policy considerations mandated the interpretation that only those listed by the statute could bring such an action. In that case, as here, the couple wanting to adopt a child in their possession attempted to terminate the natural mother's rights. The court found that they were prohibited from doing so.

> When the extreme character of the present action is considered—interference with or severance of the natural rights of a parent and making the child the ward of the State—we think that in providing that the action "may be instituted" the legislative intent was to vest exclusive discretionary power in the designated public officers. *Id.* at 257.

The established law in Kentucky, based upon sound policy considerations, precludes this court from terminating the parental rights of Christine Van Wey at the request of the O'Neals.

II. Petitioner's Parental Rights Cannot be Terminated Without a Full Hearing on the Merits.

Even if this court were to proceed on the Defendants' motion, the proceeding, in reality, would be a petition to *involuntarily* terminate her rights. Soon after signing the petition to voluntarily terminate her rights, Christine Van Wey revoked her consent. No order of termination was ever entered. It is abundantly clear that, if ever Christine Van Wey consented to have her rights terminated, at this point in time she is fighting desperately for her son. It would be a mockery to pretend otherwise. This court cannot now in good conscience terminate Ms. Van Wey's rights as if this were a "voluntary" proceeding.

If this court proceeds at all, it must treat the matter as an involuntary termination and provide Ms. Van Wey with all the rights and protections to which she is entitled by state and federal law. Specifically, KRS 199.603 requires pleading and proof by a preponderance of evidence that abandonment or substantial or continuous or repeated neglect or abuse has occurred. In addition, there are numerous mitigating factors that the court must consider before reaching its decision. Due process mandates a full

hearing on the merits before parental rights can be involuntarily terminated.

All proceedings thus far have been limited to the issue of immediate entitlement. There have been no pleadings filed or evidence presented going to the issue of whether Ms. Van Wey's parental rights should be terminated. In fact, to the contrary, the only evidence presented at trial as to her fitness as a parent were highly favorable reports from Iowa social services. Ms. Van Wey has an absolute right to defend any action brought to terminate her rights.

CONCLUSION

Defendants' motion to terminate the parental rights of Christine Van Wey should be overruled. Frank and Donna O'Neal do not have standing to make such a request. Further, even if this court should find that such a motion is valid, Ms. Van Wey is absolutely entitled to a hearing pursuant to KRS 199.603.

Respectfully submitted,

LEGAL AID SOCIETY, INC.
425 West Muhammad Ali Blvd.
Louisville, Kentucky 40202
Telephone: (502) 584-1254

By: _____
ELLEN G. FRIEDMAN

By: _____
ROBERT FREDERICK SMITH

APPENDIX E

PETITIONER'S BRIEF IN THE KENTUCKY COURT OF APPEALS

INTRODUCTION

This is an appeal from the denial of appellant's petition for immediate entitlement to the possession and custody of her son, the award of permanent custody to appellees and the termination of appellant's parental rights.

STATEMENT OF POINTS AND AUTHORITIES

I. The Trial Court's conclusion that the appellant was not acting under duress when consenting to the termination of her parental rights was clearly erroneous. Authorities. (Omitted)

II. The Trial Court erred in refusing to find that appellant made a timely revocation of her consent to terminate her parental rights.

III. The Trial Court erred in applying the best interest standard and its finding that it is in the best interest to stay with the appellees is clearly erroneous.

IV. It was an abuse of discretion for the Trial Court to award permanent custody to appellees.

V. It was an abuse of discretion for the Trial Court to terminate appellant's parental rights.

APPENDIX F

PETITIONER'S REPLY BRIEF IN THE KENTUCKY COURT OF APPEALS

STATEMENT OF POINTS AND AUTHORITIES

Arguments:

I. A finding of duress or undue influence is a subjective test and appellant herein was under duress and undue influence when she signed a petition to terminate her rights.

II. A petition to voluntarily terminate parental rights is the legal equivalent of a consent to adopt.

III. A consent to voluntarily terminate rights can be revoked before a final order for sufficient cause.

IV. The Court limited the proceedings to the issue of immediate entitlement and consequently erred in applying the wrong standard, and in awarding permanent custody and terminating appellant's parental rights.

V. The Court was not compelled by KRS 199.611 to sign an order of termination.

APPENDIX G

PETITIONER'S BRIEF IN KENTUCKY COURT OF APPEALS—APPELLANT'S RESPONSE TO APPELLEES O'NEALS' PETITION FOR REHEARING

STATEMENT OF POINTS AND AUTHORITIES

Authorities: (Omitted)

I. The Court of Appeals did not overlook any material fact in the record.

II. The Court of Appeals was correct in concluding that Christine Van Wey signed the petition to terminate her parental rights under duress and undue influence.

III. The Court of Appeals has a complete and accurate understanding of the applicable case law presented.

IV. The Court of Appeals complied with CR 52.01.

APPENDIX H

PETITIONER'S BRIEF IN KENTUCKY COURT OF APPEALS—APPELLANT'S RESPONSE TO PETITION FOR REHEARING BY GUARDIAN AD LITEM, APPELLEE

STATEMENT OF POINTS AND AUTHORITIES

Authorities: (Omitted)

I. The Court of Appeals applied the correct legal standard to this case.

II. The Court of Appeals neither misconceived nor overlooked the applicable law on revocation.

APPENDIX I

PETITIONER'S BRIEF IN KENTUCKY SUPREME COURT—RESPONSE TO MOTIONS OF RAYMOND F. O'NEAL AND DONNA O'NEAL AND GUARDIAN AD LITEM FOR DISCRETIONARY REVIEW

Arguments:

I. The Opinion of the Court of Appeals is based upon established law.

II. The cases presented by movants are not on point.

III. The Court of Appeals had jurisdiction to review this case.

IV. The Court of Appeals applied the standards mandated by Kentucky and Federal law.

APPENDIX J

PETITIONER'S BRIEF IN KENTUCKY SUPREME COURT—BRIEF FOR RESPONDENT, CHRISTINE VAN WEY

STATEMENT OF POINTS AND AUTHORITIES

I. The Trial Court's conclusion that the respondent was not acting under duress and undue influence when consenting to the termination of her parental rights is clearly erroneous.

II. Respondent made a timely revocation of her consent to terminate her parental rights and for sufficient cause.

III. Application of a best interest standard without due consideration to the presumption in favor of the natural parent is contrary to State and Federal law.

IV. It was an abuse of discretion for the Trial Court to award permanent custody to movants.

V. It was an abuse of discretion for the Trial Court to terminate respondent's parental rights.

IV. The entry of an order of termination labeled "voluntary" by the Trial Court does not preclude appeal.

Office - Supreme Court, U.S.
FILED
FEB 6 1984
ALEXANDER L. STEVAS
CLERK

No. 83-1123

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1983

CHRISTINE VAN WEY, - - - - Petitioner

versus

RAYMOND F. O'NEAL,
DONNA O'NEAL and
BABY BOY VAN WEY, - - - - Respondents

BRIEF FOR THE RESPONDENT, BABY BOY VAN WEY, IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF KENTUCKY

CHARLES W. DOBBINS, JR.*
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Guardian Ad Litem

WILLIAM ALLEN BUCKAWAY, JR.
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Counsel for Guardian Ad Litem
**Counsel of Record*

February 3, 1984

WESTERFIELD-BONTE CO., 619 W. KENTUCKY—P.O. BOX 3251, LOUISVILLE, KY.

QUESTION PRESENTED

When it has been determined by the Trial Court that a natural parent had voluntarily petitioned to terminate her parental rights, and a hearing in accordance with the Kentucky statute regarding voluntary terminations has been duly held, should the United States Supreme Court entertain an appeal based on the Due Process Clause of the Fourteenth Amendment absent claims below by Petitioner that the statute is constitutionally invalid or the special presentation by Petitioner of other federal constitutional issues to the Kentucky courts.

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1983

No. 83-1123

CHRISTINE VAN WEY - - - - *Petitioner*

v.

RAYMOND F. O'NEAL
DONNA O'NEAL
BABY BOY VAN WEY - - - *Respondents*

BRIEF FOR THE RESPONDENT, BABY BOY VAN WEY, IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF KENTUCKY

STATEMENT OF THE CASE

A. Material Facts

The record establishes that in November, 1980, Christine Van Wey was a resident of Muscatine, Iowa. She was approximately seven (7) months pregnant and the mother of two daughters, ages 5 and 7 years. Ms. Van Wey, separated from her husband, Stanley Van Wey, had been living with a John Adler at some point during her pregnancy with the child, Baby Boy Van Wey. According to her testimony, Mr. Adler deserted Van Wey during her fifth month of pregnancy. Although she stated in her sworn Petition for Voluntary Termination of Parental Rights that the natural father of the child was unknown. Van Wey later testified that Mr. Adler was, in fact, the child's natural father.

Feeling unable to provide for her two daughters, Van Wey wrote Attorney Katie Brophy (after having viewed a television program on which Ms. Brophy had appeared) soliciting her aid in placing the unborn child for adoption in Kentucky. Receiving no response from Ms. Brophy, Van Wey placed a telephone call to Ms. Brophy's office and spoke with her secretary, Sandra Hafer. Van Wey then drove to Louisville from Iowa to deliver the unborn child and place the child for adoption.

In Louisville, formal steps were taken by Van Wey to place her unborn child for adoption. She executed a consent to adoption. In addition, she made application to the Kentucky Department for Human Resources to place the unborn child for adoption and confirmed this application at a meeting with an adoptions worker employed by the Department. Van Wey's application to place the child was approved and the O'Neals (Respondents herein) did receive the child (and have since adopted the child).

Subsequently, Van Wey filed a Petition for Voluntary Termination of Parental Rights in the Jefferson Circuit Court of Kentucky (Petitioner's Appendix D). A hearing was held by Judge Jack E. Mudd, Jefferson Circuit Court Judge, on Van Wey's Petition to voluntarily terminate her parental rights. In its Opinion and Order, that Court found that Van Wey had satisfied the Court that she understood the nature of the proceedings and that she voluntarily wanted to terminate her parental rights for the purpose of having her child adopted. (See Page 45a, Petitioner's Appendix N).

A Petition for Immediate Entitlement and Custody was later filed on behalf of Van Wey on April 30, 1981 —greater than three months after the child was placed in the O'Neals' home on January 24, 1981. (Petitioner's Appendix E). This Petition was buttressed by Van Wey's claims that she had executed the Petition to Voluntarily Terminate (her) Parental Rights under extreme emotional duress and had been coerced to appear and testify at the hearing on her Petition. However, after a full-scale hearing, the trial court concluded that Van Wey's Petition and actions were voluntary and not the product of duress or coercion. (Petitioner's Appendix N).

B. Federal Questions Raised Below

By the admissions contained in the Petition for a Writ of Certiorari filed herein by Van Wey, the Kentucky Courts did not address a federal question or questions in the proceedings below. This result is consistent with the record below which establishes that Van Wey simply failed to properly raise and press before the Courts of Kentucky any federal question in the context of this case.

In her Petition for Writ of Certiorari, Petitioner states that she raised constitutional issues before the Kentucky Courts. An examination of the record and the assertions in her Petition establishes that Petitioner did not present with fair precision, nor press for resolution, a claim under the Fourteenth Amendment to the United States Constitution or any other federal constitutional claim.

At the trial court, Petitioner's reference to a "due process" hearing was merely an argument that Kentucky statutory provisions found in KRS 199.603 (see Petitioner's Appendix T) require a fitness hearing before parental rights are *involuntarily* terminated. (Record at 166-176; set out in Respondent O'Neals Appendix). The trial court record, however, is devoid of any reference to a federal constitutional question relating to "due process" or "due process rights." Petitioner's argument was, instead, predicated upon a statutory provision relating to involuntary terminations which was rendered inapplicable by the trial court's findings that the Petition to Terminate was voluntary and, thus, controlled by the statutory provisions contained in KRS 199.601, the *voluntary* termination statute. (Petitioner's Appendix T). It is, moreover, undisputed that a hearing was properly held pursuant to the voluntary termination statute. (See Petitioner's Appendix N). It is also clear that that statute, KRS 199.601, has not been claimed by Petitioner to be constitutionally invalid.

Petitioner next alleges that she presented a federal question to the Kentucky Court of Appeals. Simply stated, this was not done. The reference in her Petition filed herein is to a one paragraph statement citing *Stanley* v. *Illinois,* 405 U. S. 645 (1972). As can be seen from the record, Petitioner's argument was that the trial court abused its discretion by terminating parental rights without a fitness hearing required by KRS 199.603—essentially, the same argument advanced by Petitioner in the trial court. Again, the state trial

court had found that the cited Kentucky statute was inapplicable, that another statute (KRS 199.601) controlled, and the hearing contemplated by that statute was duly held. An argument predicated upon due process or a right to family integrity was not framed for, nor presented and pressed to, the Kentucky Court of Appeals.

Finally, Petitioner herein asserts that a federal question was presented to the Kentucky Supreme Court. As in her brief to the Kentucky Court of Appeals, the Petitioner vaguely references "due process and equal protection" in the context of an argument that the trial court abused its discretion by allegedly failing to have an additional full hearing on Petitioner's fitness. Again, this argument is predicated on Petitioner's claim that her voluntary petition should be rendered involuntary (and thus KRS 199.603, the involuntary termination statute be applied) as a result of duress and coercion. The trial court had, however, already determined that Van Wey's Petition and actions were not the product of duress or coercion but were voluntary acts.

In summary, Petitioner failed to frame a federal question for resolution by the Kentucky trial or appellate courts. Vague references to due process or equal protection were made only in the context of arguments that the Kentucky involuntary termination statute rather than the Kentucky voluntary termination statute should be applied. The trial court's findings of fact, upheld by the opinion of the Supreme Court of Kentucky, rendered that argument a nullity.

ARGUMENT

I. The Petition for Writ of Certiorari Should Be Denied Because Petitioner Failed to Properly Raise in the Kentucky Courts the Constitutional Issues She Seeks To Have Decided

The Petition for Writ of Certiorari should be denied because the Petition fails to properly raise in the Kentucky Courts the constitutional issues she now seeks to have the Supreme Court decide.

Title 28 U.S.C. §1257 provides in pertinent part as follows:

> Final judgment or decrees rendered by the highest court of a state in which a decision could be had, may be reviewed by the Supreme Court as follows: . . . (3) By writ of certiorari, . . . where any title, right, privilege or immunity is specially set up or claimed under the Constitution, treaties or statutes of, or commission held or authority exercised under, the United States.

Congress has, thus, expressly limited the authority of the Supreme Court to review judgments of the state courts to cases in which a substantial federal question has been properly raised in state court proceedings. Moreover, the Supreme Court has concluded that this limitation is jurisdictional in character. *Cardinale* v. *Louisiana,* 394 U. S. 437, 89 S. Ct. 1161 (1969). Thus, a federal issue not having been specially set up or claimed is cause for denial of a petition for writ of certiorari. *Zucht* v. *King,* 260 U. S. 174, 43 S. Ct. 24 (1922).

The jurisdictional nature of the rule against deciding claims "not pressed nor passed upon" in state court

was reaffirmed by the Supreme Court in *State Farm Mutual Automobile Insurance Co.* v. *Duel,* 324 U. S. 154, 65 S. Ct. 573 (1945). In *Duel,* the Supreme Court advised that,

> . . . the jurisdiction of this court to re-examine the final judgment of a state court cannot arise from mere reference but only from averments so distinct and positive as to place it beyond question that the party bringing the case here from such court intended to assert a federal right. *Oxley Stone Co.* v. *Butler County,* 166 U. S. 648, 17 S. Ct. 709 (1897).

See also *McGoldrick* v. *Campagnie Generale,* 309 U. S. 430, 60 S. Ct. 670 (1940).

This Court has long held that a substantial federal claim must have been asserted in state court and the constitutional or federal basis have been brought to the attention of the state court with fair precision and in due time. *Street* v. *New York,* 394 U. S. 576, 89 S. Ct. 1354 (1969); *New York ex rel. Bryant* v. *Zimmerman,* 278 U. S. 63, 49 S. Ct. 61 (1928). Thus, the issue presented to the Supreme Court for review on a writ for certiorari must have been "pressed or passed on" in the state courts below. *Illinois* v. *Gates,* —— U. S. ——, 103 S. Ct. 2317 (1983); *State Farm Mutual Insurance Co.* v. *Duel, supra.*

In its Petition for Writ of Certiorari filed herein, the Petitioner asserts the following:

> (1) the denial of a liberty interest of a natural parent in the care and custody of his or her

child protected by the Due Process Clause of the Fourteenth Amendment; and

(2) the denial of a fundamental liberty interest of a natural parent in family integrity protected by the Due Process Clause of the Fourteenth Amendment.

Even a curosory review of the record below, however, reveals that the Petitioner did not press the issues presented in her Petition for Writ of Certiorari to the state courts. Mere inference is insufficient. *Oxley Stone Co.* v. *Butler County, supra.* Vague reference to "due process" is insufficient. *Bowe* v. *Scott,* 233 U. S. 658, 33 S. Ct. 769 (1914). *See also* separate opinion of Mr. Justice White in *Brody* v. *Maryland,* 373 U. S. 83, 83 S. Ct. 1194 (1963).

As reviewed above, the Petitioner herein asserts that she raised a due process issue in three separate presentations to the Kentucky state courts. The record cited by Petitioner clearly establishes that any such presentation was not made with fair precision and, in each instance, was a mere statement made in the context of an argument as to which of two Kentucky statutes should be applied in the resolution of this matter. As admitted in the Petition, not one of the Kentucky Courts addressed or "passed on" the alleged presentation of a constitutional issue or issues. The Supreme Court has consistently held that "when . . . the highest state court has failed to pass upon a federal question, it will be assumed that the omission was due to want of proper presentation in the state courts, unless the aggrieved party in this Court can affirmatively

show the contrary." *Street* v. *New York, supra,* 394 U. S. at 582, 89 S. Ct. at 1360; *Bailey* v. *Anderson, supra; Webb* v. *Webb,* 451 U. S. 493, 101 S. Ct. 1889 (1981).

At the trial court level, Petitioner filed a three page Response to a motion filed by the O'Neals (Respondents herein). It is by this document that Petitioner claims to have asserted substantial federal claims at the trial court level. That Response, however, is devoid of any citation of a federal or constitutional basis upon which a claim can be founded. Petitioner rather argues that the Kentucky statute on involuntary terminations which requires a fitness hearing (KRS 199.603) rather than the Kentucky statute on voluntary terminations (KRS 199.601) should be applied. In her Conclusion to that Response, Petitioner stated only that she was ". . . entitled to a hearing pursuant to KRS 199.603." (Record at 166-168). Clearly, no federal question was pressed at the trial court level.

This issue was briefly noted in Petitioner's written arguments to the Kentucky Court of Appeals. However, any discussion was in the context of Petitioner's continuing argument that she was entitled to a fitness hearing in accordance with the provisions of the Kentucky involuntary termination statute. Her argument, entitled "It Was An Abuse of Discretion for the Trial Court to Terminate Appellant's Parental Rights" was concluded with: "Appellant was entitled to an additional full hearing on her fitness before her parental rights were terminated. *Phillips* v. *Horlander,* 535 S. W. 2d 72 (Ky. 1975)." Since the findings of the

trial court were that Petitioner had acted voluntarily and the required statutory hearing on that issue had been held, this argument that the involuntary termination statute required a fitness hearing was irrelevant. At this juncture, Petitioner did state that the "right to family integrity" is a protected liberty instead, but this statement, as stated above, was made in the context of her continuing argument for a fitness hearing. The argument clearly failed to "press" a substantial federal issue.

Finally, the brief of Petitioner to the Kentucky Supreme Court included a reference to due process rights. Again, however, the reference was a legal comment made in the context of Petitioner's renewed argument that the provisions of the Kentucky involuntary termination statute require a fitness hearing.

It is notable that the record is devoid of any claim that either the applicable voluntary termination statute or the involuntary termination statute relied on by Petitioner is constitutionally invalid. Petitioner based her case on the argument that this matter should have been deemed an involuntary termination and, thus, subject to all provisions of that statute. On factual and legal grounds, the Kentucky Courts held otherwise.

In summary, Petitioner failed to specially set up or press a federal constitutional claim in this action. Therefore, her Petition for Writ of Certiorari should be denied for failure to establish jurisdiction in the Supreme Court of the United States. 28 U.S.C. §1257.

II. The Petition for Writ of Certiorari Should Be Denied Because the Judgment Below Is Supported by Adequate and Independent State Grounds

The Supreme Court has consistently held that it will not entertain a Petition for Writ of Certiorari to review a state court judgment based upon an adequate and independent state ground. *Murdock* v. *Memphis,* 20 Wall. 590, 636; *Berea College* v. *Kentucky,* 211 U. S. 45, 29 S. Ct. 33 (1908); *Fox Film Corp.* v. *Muller,* 296 U. S. 207, 56 S. Ct. 183 (1935). In this instance, the state court judgment is based upon nonfederal or state grounds which are adequate to support the state court judgment. Thus, the Petition filed herein should not be granted. *Wilson* v. *Lowe's, Inc.,* 355 U. S. 597, 78 S. Ct. 526 (1958). *See also, Herb* v. *Pitcairn,* 324 U. S. 117, 65 S. Ct. 459 (1945).

Three issues were presented at a full-scale hearing held by the state trial court in this matter. As summarized in the Opinion of the Kentucky Supreme Court (Petitioner's Appendix A, Page 5a), the issues were:

(1) Was Ms. Van Wey's consent obtained in the first instance by duress or coercion?

(2) Did Ms. Van Wey have a right to revoke her consent or withdraw her petition at any time before judgment regardless of whether or not her acts were initially voluntary?

(3) Should the question of termination be decided on the basis of the law that relates to voluntary termination, KRS 199.601, or the law that relates to involuntary termination, KRS 199.603?

Having voluntarily petitioned the trial court to terminate her rights and having appeared before that Court and testified confirming her voluntary petition, Van Wey subsequently alleged that her apparent voluntary actions were the product of duress or coercion. The trial court, however, rendered its findings that Van Wey's actions were not coerced but were voluntary. Therefore, provisions of the voluntary termination statute were applicable. A hearing was held by the trial court for the purposes set out in the voluntary termination statute. Acting in its role as the "finder of fact," the trial court determined that Van Wey had voluntarily accomplished the legel steps required to voluntarily terminate her parental rights. The Supreme Court of Kentucky held that the finding of the trial court was ably supported by the record. Thus, properly applying the Kentucky voluntary termination statute, the trial court considered the best interests of the child and ruled accordingly.

Having determined that the Petition to terminate parental rights was voluntary, the Kentucky statute mandated consideration of the best interests of the child. The constitutional validity of this statute has never been questioned by Petitioner.

The Kentucky Supreme Court did address Petitioner's apparent argument that she had an absolute right to change her mind or to revoke her voluntary consent or petition. That Court held that the Petitioner did not have an absolute right to revoke but that such action must be viewed by considering the best interests of the child. Petitioner had voluntarily acted

to terminate her parental rights and place the child with adopting parents. In so doing, Petitioner was acting in accordance with a plan she had developed two months before the child's birth and which was accomplished only by her efforts and travel from Iowa to Kentucky.

Kentucky case law is well established that in the circumstances in which a natural parent has voluntarily relinquished actual permanent custody of the child to another, the natural parent must establish that revocation of consent or return of custody of the child shall not be harmful to the child but, rather, in the child's best interests. *Lee* v. *Thomas,* 297 Ky. 858, 181 S. W. 2d 457 (1944); *Rose* v. *Ledford,* 306 Ky. 662, 208 S. W. 2d 957 (1948); *Shaw* v. *Graham,* 310 S. W. 2d 522 (Ky. 1958); *Warner* v. *Ward,* 401 S. W. 2d 62 (Ky. 1966); *Galilean Children's Home* v. *Ball,* 308 Ky. 319, 214 S. W. 2d 403 (1948); *Higgason* v. *Henry,* 339 S. W. 2d 929 (Ky. 1960). See also *Skaggs* v. *Gannon,* 293 Ky. 795, 170 S. W. 2d 12 (1943); *Williams* v. *Neuman,* 405 S. W. 2d 556 (Ky. 1966); *Paynter* v. *Smith,* 481 S. W. 2d 270 (Ky. 1972). Thus, Kentucky law places the burden on the party that voluntarily relinquished custody of the child to prove that a return of custody is in the best interest of the child. In this instance, Petitioner failed to meet that burden. Moreover, Petitioner did not attack this legal conclusion on federal or constitutional grounds below.

In presenting her Reasons for Granting the Writ, Petitioner advances arguments predicated on constitu-

tional claims directed at (I) the trial court's failure to apply the Kentucky involuntary termination statute and (II) the trial court's application of the voluntary termination statute.

To support her arguments, Petitioner recites that the interest of a natural parent in the care and custody of his or her child is a liberty interest protected by the Due Process Clause of the Fourteenth Amendment. This Supreme Court may so hold. *See Santosky* v. *Kramer,* 455 U. S. 745, 102 S. Ct. 1388 (1982) and *Stanley* v. *Illinois,* 405 U. S. 645, 92 S. Ct. 1208 (1972). Nevertheless, this "truth" is not affected in the context of the facts in this instance. Petitioner acted voluntarily and in accordance with precise statutory requirements to terminate her parental rights. That statute has not been attacked by Petitioner as constitutionally invalid. It adequately supports the decision of the Kentucky Supreme Court.

In *Quillon* v. *Walcott,* 434 U. S. 246, 98 S. Ct. 549 (1978), the Supreme Court upheld application of a "best interests" standard in the face of an attack as to the constitutional invalidity of Georgia statutory law. Unlike *Quillon,* the Petitioner in this cause had acted to voluntarily terminate her rights. Moreover, the Petitioner in *Quillon,* had attacked the Georgia statutes as violative of Fourteenth Amendment protection. Petitioner herein simply failed to so argue.

Kentucky Courts held that Petitioner did not have an absolute right to "undo" the effects of her long-

range plan and voluntary petition. This holding is consistent with Kentucky case law (cited herein) and *Quillon* v. *Walcott, infra.*

Best interests of the child were properly considered in accordance with Kentucky statutory law and well established case law precedent. (See citations above). The trial court's actions are also consistent with Kentucky procedure. Clay Ky. Prac., 3rd Ed., Civil Rule 41.01. Ky. Rules of Civil Procedure, Rule 41.01. (See Supreme Court Opinion, page 10a, Petitioner's Appendix).

In conclusion, the non-federal grounds supporting the decision of the state court below is sufficiently broad to sustain the state court judgment. Moreover, the non-federal bases are independent of any federal question (assuming, *arguendo,* that any federal question was raised and pressed below). A state court decision resting on adequate and independent state grounds shall not be reviewed by the Supreme Court. *Illinois* v. *Gates, supra; Cardinale* v. *Louisiana, supra.* This rule, consistently applied by the Supreme Court, gives due regard for the "appropriate relationship" of the Supreme Court to state courts. *McGoldrick* v. *Campagnie Generale, supra; Wilson* v. *Loew's, Inc., supra.*

III. Summary

In summary, Petitioner did not specially set up and press any federal constitutional issue in the Kentucky Courts below. The Supreme Court is, therefore,

without jurisdiction to grant the Petition filed herein. Moreover, the opinion of the Supreme Court of Kentucky and below rests firmly on adequate and independent non-federal grounds.

CONCLUSION

For the reasons reviewed in this Brief, the Petition for a Writ of Certiorari to review the judgment and opinion of the Supreme Court of Kentucky should be denied.

Respectfully submitted,

CHARLES W. DOBBINS, JR.
Guardian Ad Litem

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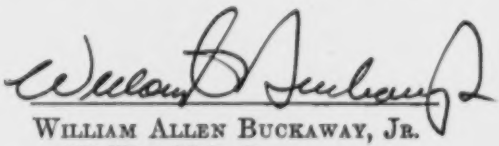
Counsel for Respondent

PROOF OF TIMELY FILING

I, William Allen Buckaway, Jr., having been admitted to practice before the Supreme Court of the United States, do hereby certify that forty (40) copies of the foregoing Brief in Opposition to Petition for Writ of Certiorari have been timely filed by depositing same in a United States post office or mailbox, with first-class postage prepaid, properly addressed to Hon. Alexander Stevas, Clerk, United States Supreme Court, on February 3, 1984, within the time allowed for filing the Brief, and I, after having been duly sworn, state that the mailing took place at an office of the U. S. Post Office on said date within the time permitted for said filing.



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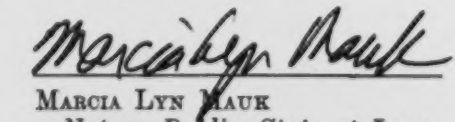
COMMONWEALTH OF KENTUCKY }
COUNTY OF JEFFERSON }

Subscribed and sworn to before the undersigned, a Notary Public, by William Allen Buckaway, Jr., on this 3rd day of February, 1984.

My commission expires: July 24, 1987.



MARCIA LYN MAUK
Notary Public, State at Large

PROOF OF SERVICE

I, Charles W. Dobbins, Jr., guardian ad litem herein, having first been duly sworn, states that three (3) copies of the foregoing Brief in Opposition to Petition for Writ of Certiorari were mailed, first class, postage prepaid, to Ellen G. Friedman and Robert Frederick Smith, Counsel for Petitioner, 425 West Muhammad Ali Boulevard. Louisville, Kentucky, 40202; Irene P. Long, Counsel for Respondent, Route 2, Bedford, Kentucky, 40006; Stephen P. Smith, Jr., Counsel for Respondent, 1526 Kentucky Home Life Building, Louisville, Kentucky, 40202, on this 3rd day of February, 1984. I further state that to my knowledge all parties required to be served have been served. I do further state that I have duly applied for admission to practice before the Supreme Court of the United States and am awaiting notification of action on my application by the Court.

CHARLES W. DOBBINS, JR.
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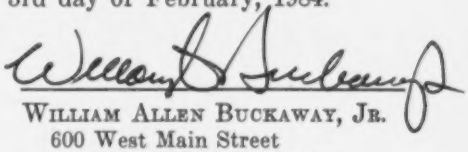
COMMONWEALTH OF KENTUCKY }
COUNTY OF JEFFERSON }

Subscribed and sworn to before the undersigned a Notary Public, by Charles W. Dobbins, Jr., this 3rd day of February, 1984.

My commission expires: July 24, 1987.

MARCIA LYN MAUK
Notary Public, State at Large

I, William Allen Buckaway, Jr., having been admitted to practice before the Supreme Court of the United States, do hereby certify that I have knowledge that the foregoing Affidavit of Service of Charles W. Dobbins, Jr., guardian ad litem herein, is true and correct, and that three (3) copies of the foregoing Brief in Opposition to Petition for Writ of Certiorari were duly mailed to all counsel of record as sworn above on this 3rd day of February, 1984.



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